

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

427

No. 17,475

CHARLES MATTHEWS.

Appellant.

v.

UNITED STATES OF AMERICA.

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals

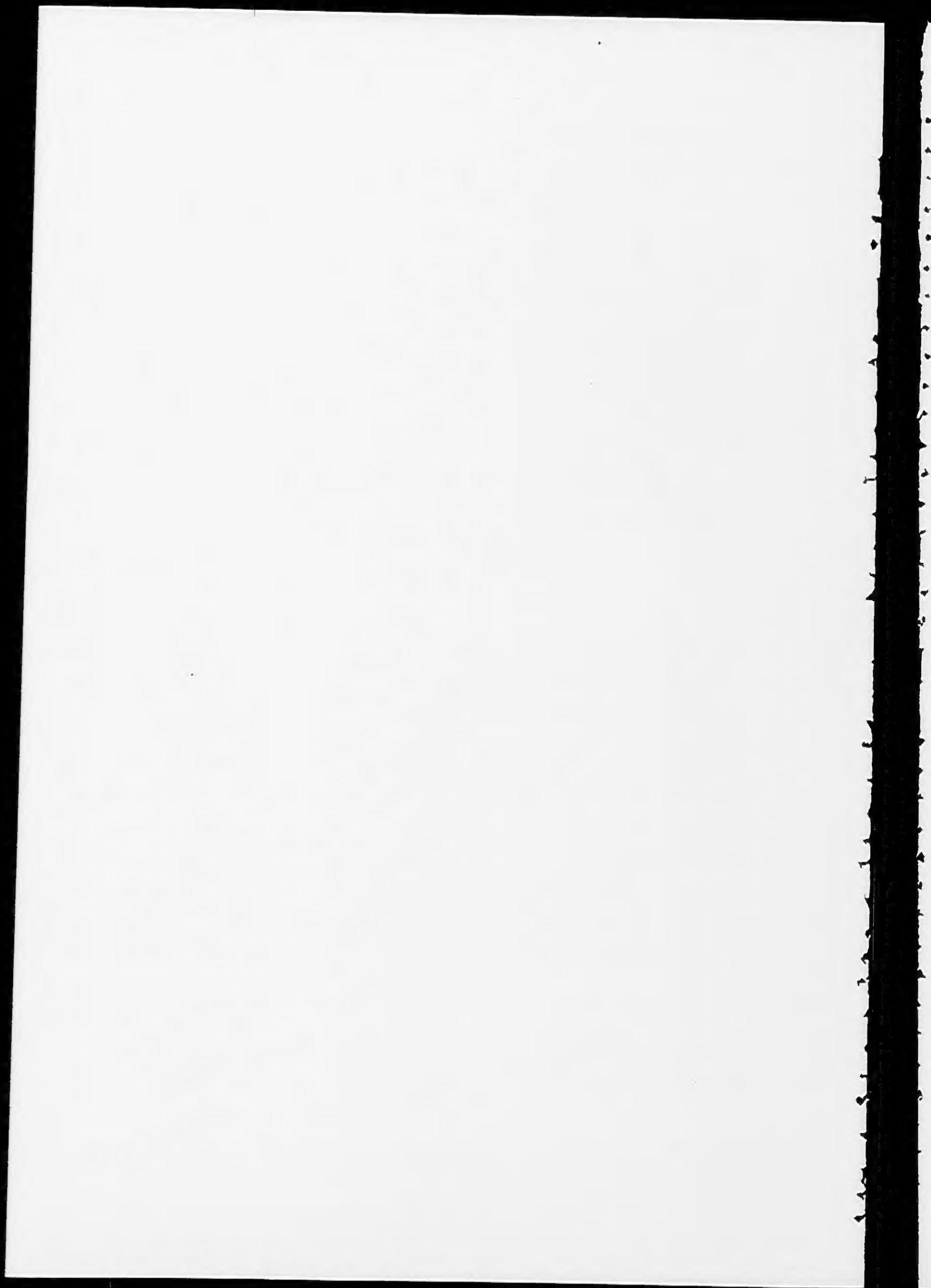
MAR 1963

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(i)

QUESTIONS PRESENTED

The question is whether a Trial Court is required under the law to give a Jury in a Criminal Case a mandatory direction that it should or must receive the testimony of a government witness with distrust, suspicion and caution, where it is shown that the witness is an accomplice, user of marihuana, giving testimony in the case for the government because he wants to help himself and has been paid money by the government.



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APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

The appellant Charles Matthews is one of four persons who was convicted by the jury in the United States District Court for the District of Columbia in Criminal Case No. 289-62 upon an indictment charging multiple violations of the Federal narcotic laws. (Title 26 U.S.C. 4704(a); Title 26 U.S.C. 4705(a); Title 21 U.S.C. 174). Upon the said conviction for three counts in the indictment, the Court imposed a general 12-year

sentence. This is an appeal from the said judgment and conviction. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1291 and Rule 37 of the Federal Rules of Criminal Procedure.

STATUTES AND RULES INVOLVED

Title 21, United States Code, Section 174:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

"For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. (Feb. 9, 1909, ch. 100 § 2(c), 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, § 1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; Nov. 2, 1951; ch. 666, §§ 1, 5(1), 65 Stat. 767; July 18, 1956, ch. 629, Title I, § 105, 70 Stat. 570.)"

Title 26, United States Code, Section 4704(a):

"(a) General requirement.

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package;

and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found . . . (Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 550, amended Aug. 31, 1954, ch. 1147, § 8, 68 Stat. 1004.)"

Title 26, United States Code, Section 4705(a):

"(a) General requirement

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate . . .

"(Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 551, amended Aug. 31, 1954, ch. 1147, §§ 6, 7, 68 Stat. 1003; Aug. 1, 1956, ch. 852, § 12(c), 70 Stat. 909.)"

Rule 30, Federal Rules of Criminal Procedure:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

STATEMENT OF THE CASE

An indictment was filed in the Court below charging the appellant Charles Matthews and six others¹ with offenses against the narcotics

¹ The other defendants were: Ellen M. Phelps; Roland R. Henry; Norman Pannell; Valaria Pannell, Clinton Johnson and Doris L. Gardiner. Six of the seven named defendants went to trial. Clinton Johnson pleaded guilty to one of the counts in the indictment (count 3) at the start of the trial, and later testified during the trial as a government witness.

laws of the United States. The indictment was drawn in 22 Counts. The first count charged all of the defendants with the offense of conspiracy.² The remaining 21 counts arose out of 7 alleged substantive offenses involving the transfer by some of the defendants of narcotic drugs to two undercover agents of the Federal Bureau of Narcotics (named Herman A. Scott and Thomas E. Broadnax, Jr.).³ Each alleged transfer (sale) gave rise to 3 Counts in the indictment. A violation of Title 26 U.S.C. Sec. 4705(a), 26 U.S.C. Sec. 4704(a), and 21 U.S.C. 174. The 7 alleged transactions were as follows:

1. On December 21, 1961, the defendant Clinton Johnson sold Herman Scott a quantity of heroin (Counts 2, 3 and 4).

2. On January 11, 1962, Doris L. Gardiner sold a quantity of drugs to Thomas E. Broadnax, Jr. (Counts 4, 5, 6 and 7).

3. On January 22, 1962, the defendants Norman and Valaria Pannell sold a quantity of heroin to Herman A. Scott (Counts 8, 9 and 10).

4. On January 26, 1962, Doris L. Gardiner sold a quantity of narcotic drugs to Thomas E. Broadnax, Jr. (Counts 11, 12 and 13).

5. On February 8, 1962, the defendant Doris L. Gardiner sold a quantity of narcotic drugs to Thomas E. Broadnax, Jr. (Counts 14, 15 and 16).

6. On February 20, 1962, the defendant Doris L. Gardiner sold a quantity of narcotic drugs to Thomas E. Broadnax, Jr. (Counts 17, 18 and 19).

² The jury acquitted all six of the defendants of the conspiracy count.

³ Ellen M. Phelps was found not guilty by the jury of the 16 Counts that she was charged in. The defendant Roland R. Henry was also charged in 16 Counts in the indictment and was found not guilty by the jury. The defendants, Norman Pannell and Valaria Pannell, husband and wife, were found guilty of the three Counts that they were charged in. The defendant Doris L. Gardiner was found guilty of 15 Counts in which she was charged.

7. On February 21, 1962, the defendant Doris L. Gardiner sold a quantity of narcotic drugs to Thomas E. Broadnax, Jr. (Counts 20, 21 and 22).

The appellant Charles Matthews was charged in every Count of the indictment. In Count One (the conspiracy count) he was charged as a co-conspirator with all of the other defendants. In Counts 2, 3 and 4 (the alleged sale of drugs by Clinton Johnson to Herman A. Scott on December 21, 1961) he was charged as a principal on the theory that he aided and abetted this offense. On the remaining 18 Counts (5 through 22), he was charged on the theory that as a co-conspirator he was responsible as a principal for the unlawful acts of his fellow conspirators, who sold drugs to the Federal Agents. On all counts in which the appellant was charged as a co-conspirator, that is, Count One and the other 18 Counts (Counts 5 through 21), the jury found him not guilty. He was found guilty of only the three counts in which it was charged that he aided and abetted the sale of drugs made by Clinton Johnson to Herman A. Scott.

Since the appellant Charles Matthews was only convicted of offenses dealing with the sale made by Clinton Johnson on December 21, 1961, to Herman A. Scott, this Statement of Facts will be confined to the facts pertaining to these offenses, and will deal with other events of the trial only insofar as they bear upon the questions and issues raised in this appellant's appeal.

Herman A. Scott and Clinton Johnson were the two government witnesses who testified about the sale of December 21, 1961. Herman A. Scott testified that on December 21, 1961, he was employed as a Narcotics Agent for the Federal Bureau of Narcotics and was stationed in Washington, D.C. He was working in an undercover capacity, posing as one interested in the illicit narcotics traffic; and in this pose he made illegal purchase of drugs. One of the persons with whom he had established as one of his suppliers was Clinton Johnson, from whom he had been buying drugs for about two months then. Johnson did not, of course, know Scott's true identity.

At about 10:35 A.M. on December 21, 1961, Scott called Clinton Johnson on the telephone. Scott, at the time, was at the office of the Federal Bureau of Narcotics. This was the first of three telephone calls that Scott testified he made to Clinton Johnson that day. In this first call he asked Johnson if he could get him a half ounce of heroin. In reply, The Agent said that Clinton Johnson told him that he could get the drugs because he had spoken to the appellant Matthews earlier in the morning.⁴ Clinton Johnson then told The Agent that it would cost \$125.00 and asked him to bring the money over to his apartment.

Pursuant to this conversation The Agent obtained \$125.00 of official government money and went to Clinton Johnson's home at 1401 Girard Street, Northwest, apartment 40, and gave him the money. He did not then receive any drugs for the money. Scott testified that the arrangement was that Clinton Johnson was to get the drugs from someone else (according to Scott, Johnson said, from the appellant Matthews, but see footnote 4). Accordingly, Johnson asked Scott to call him back later that day.

Agent Scott said he left the apartment and returned to the Bureau of Narcotics. He said he called Johnson again at about noon. (The second phone call.) According to Agent Scott, Johnson told him that he had not heard from the appellant Matthews and asked him to call back in about one-half hour.

At approximately 1:40 P.M., Agent Scott said he again called Clinton Johnson and that he told him to come on up to his apartment, that he had just left Matthews and received the heroin.

Herman A. Scott said he arrived at the apartment of Clinton Johnson's at about 2:15 P.M. He said when he walked in Johnson pointed out a white glassine envelope that was lying on a table. Scott picked up the

⁴ During the cross examination of Agent Scott, the Court permitted recordings of the three telephone conversations between Johnson and Scott on December 21, 1961, to be played in open Court. It was demonstrated by the recordings, and the witness Scott admitted, that Clinton Johnson did not mention the appellant's name in any of the three telephone calls; but that it was Agent Scott who mentioned his name.

package and put it in his jacket pocket. The two men had a short conversation and Scott left the apartment.

At the trial Scott identified Government's Exhibit 1B as a glassine envelope that he obtained from Johnson. He also testified that the envelope was sent to the Federal Bureau of Investigation's laboratory for latent fingerprint tests. Government counsel stipulated that the examination was negative. Later, during the trial the white powder substance that was in the envelope was identified by a government chemist as being a mixture of heroin hydrochloride.

On cross examination of Agent Scott, it was brought out that while Agent Scott was working in an undercover capacity he had purchased drugs from Johnson before this sale of December 21, 1961. On September 21, 1961, Johnson sold him a bottle of liquid cocaine. On the next day, September 22, 1961, Johnson sold him another bottle of cocaine; on December 14, 1961, Johnson sold Scott 25 capsules of heroin.⁵

Scott said that at no time did he ever see Clinton Johnson in the company of the appellant Matthews. He also said that he had no way of being certain that what Johnson said about obtaining drugs from Matthews on December 21, 1961, was in fact true. It was also established through the questioning of Scott on cross examination that when Scott made the three telephone calls to Johnson on December 21, 1961, from the office of the Bureau of Narcotics, other agents were present (in fact some were listening in and recording the conversations), and that they knew of the sale that was to take place.

Clinton Johnson next testified for the Government about this transaction. He identified Charles Matthews in the Court Room. He said that

⁵ At this point counsel for the Government stipulated that Johnson was then charged and awaiting trial in two other cases; United States District Court for the District of Columbia Criminal Case No. 288-62 in an indictment with others for the offense of narcotic conspiracy, and the violation of substantive narcotic offenses; United States District Court for the District of Columbia Criminal Case No. 214-62 for the sale of drugs to Scott on the dates mentioned above, and for the possession of 141 capsules of heroin on January 17, 1962, when he was arrested.

he received a telephone call at about 10 or 10:30 A.M. on December 21, 1961, from Agent Herman A. Scott. At the time Scott was not using his true name but was known to Clinton Johnson as Ray Wright, a person who was interested in buying drugs for resale. Scott asked Johnson, during this telephone conversation, if Johnson could get a half ounce of heroin. Johnson said to Scott that he would have to call back later, because he, Johnson, had to make a call and find out first. He said that, thereafter, he called the appellant Charles Matthews. He asked Charles Matthews if he could purchase a half ounce of heroin. Charles Matthews said yes and would call him back. In about a half hour Matthews called him back, saying that he would meet Johnson at 13th and Girard Street, N.W. with the drugs. Johnson said that in the meanwhile Scott came to his apartment and brought \$125.00.

Johnson said he met Matthews at 13th and Girard Street, N.W. He gave him the \$125.00. Matthews told him that he placed the heroin in some bushes nearby and for Johnson to go pick it up. This Johnson said he did, and after Matthews saw him, he drove off in his automobile. Johnson went back to his apartment and later talked to Scott on the telephone. Still later, Scott came by his apartment and picked the drugs up.

The cross examination of the witness Johnson showed that there were many things about him and his background that affected his credit as a witness: He had a criminal record; he had a long history of dealing in the narcotic traffic; he used marijuana; and he was an informer and an accomplice in the sale of drugs that he testified about. These infirmities regarding Johnson were developed as follows:

1. Johnson's criminal record

On May 12, 1950, he was sentenced to 4-1/2 years in prison by the United States District Court for the District of Maryland after having been convicted of selling heroin and possessing marijuana. On June 29, 1955, he was convicted by a jury in the United States District Court for the District of Columbia for violation of the Marijuana Tax Stamp Act and was

sentenced on June 1, 1955, for 7 years imprisonment. He received a conditional release from this custody on May 26, 1960. From this day until the expiration of his sentence on January 1, 1962, he was to be under the supervision of the Parole Board.

2. Johnson's involvement in the narcotic traffic after release from prison

Johnson admitted that his first contact with narcotics was in the year 1949. In July or August of 1961, about 14 months after his release from prison and while he was still under the supervision of the Parole Board, he started selling drugs again. He began selling marijuana from his home. He sold drugs from then until he was arrested on January 17, 1962, except when he was out of supply. During this 6- or 7-month period when he was selling drugs, he sold marijuana, cocaine and heroin. He admitted the two sales of liquid cocaine to Scott (on September 21 and 22, 1961), and the other sale of 25 capsules of heroin to Scott (on September 14, 1961). On January 17, 1962, he was arrested by Agent Ivan Wurms and Agent John Thompson at an alley near his home. He was taken to his apartment by the arresting officers, who, upon searching the same, found 141 capsules of heroin secreted therein.

3. Johnson's use of marijuana

Johnson denied that he had used heroin or cocaine. He did admit that he had smoked marijuana. The last time that he had used marijuana was in the latter part of the year 1961. He denied that he was smoking marijuana regularly.⁶

⁶ The government chemist, William P. Butler, testified on cross examination that marijuana was a plant substance which had been brought under the narcotic control through a Statute of Congress. He said that it is considered a drug but not a narcotic drug.

4. Johnson was a paid informer and a witness who testified for the government because he expected to benefit for doing so
-

When Johnson was arrested by Federal Agents near his home on January 17, 1962, he was questioned and refused to give any information about his illegal activities. He was released on bail the next day and about two or three weeks later Agent Wurms called and invited him to come to the Bureau's office. Johnson met with Agent Wurms. Wurms asked him to cooperate with the government. He was told of the many sales of drugs that he had made to Agent Scott and was advised that as a subsequent narcotic law offender he was subject to a heavy penalty. Johnson said that because he wanted to help himself he agreed to cooperate with the government.

At the time he agreed to help the agents he did not expect to receive any money. After talking to a person named Estella Murphy, who was a paid informer, and being told by her that he should ask the agent for some money, he spoke with Mr. Wurms. Agent Wurms told him he would see what he could do. He later began to receive money from Agent Wurms from time to time. From the time that he agreed to cooperate with the government down to the time of trial, Johnson estimated that he had received a couple of hundred dollars from him.

He said that the agent said that he could not make any promises but that they would talk with Assistant United States Attorney Smithson for him. He later met Mr. Smithson who told him that if he helped the government he would be helping himself. Nothing definite was said or promised to him, but he had hopes that something would be done for him.

As a part of this agreement to cooperate, Johnson gave the government a written statement, he testified before the Grand Jury in this case and in the other conspiracy case (Cr. No. 288-62), and he testified in the instant case. He was charged as a defendant in this case. In the company of his lawyer and upon his advice, he pleaded guilty to Count 3. Significantly, his lawyer was recommended to him by Mr. Smithson, the Assistant

United States Attorney, who represented the Government in the case.

Before the case was submitted to the jury, the appellant Matthews submitted three written instructions to the Court regarding the witness Clinton Johnson as follows:

1. "The witness Clinton Johnson who testified in this case for the government is a paid informer and a drug user. You will recall that he admitted to this on the witness stand. In evaluating the testimony given by this witness against the defendant, Charles Matthews, you are instructed that his credibility, as the credibility of all witnesses, is for you to decide. Credibility ladies and gentlemen of the jury, is the credence or belief that is to be given to a witness' testimony. In the instance where the witness is a paid informer, you are required under the law to scrutinize his testimony clearly for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness' own interest. The requirement that you do so is more strong where it is additionally shown that the paid informer is also a drug user. In such an instance, you are instructed that you should look to see if there is some corroboration of his testimony. That is, to see if there were other and separate facts or circumstances proven in this case that tend to directly or indirectly establish that the facts about which he testified did occur. Alternatively, you are instructed that the testimony of a paid informer who is also a drug user should be received by you with suspicion and acted upon with caution." (Defendant's Instruction No. 16)
2. "The witness Clinton Johnson who testified in this case for the government was also charged as a defendant in this case. He was charged in Count 1 of this indictment, which charges the conspiracy; and was also named as a defendant in Counts 2, 3 and 4 of the indictment. These latter named counts arise from the sale of one-half ounce of heroin by him to Agent Scott on December 21, 1961. You recall the testimony of the agent and of Mr. Johnson himself regarding this occurrence, and the fact that Johnson has admitted his guilt of these offenses in open Court. Because Mr. Johnson was concerned in the commission of this specific crime, he is what is known in the Law as an 'accomplice'.

"You are instructed as a matter of law that the testimony of an accomplice should be received by the jury with caution. It should be regarded by the jury with suspicion. It ought to be received by the jury with distrust. It should be weighed with great care. It should be subjected to close scrutiny." (Defendant Matthews' Instruction No. 6)

3. "In further regard to the testimony of the witness Clinton Johnson, you will recall that it was proved (1) that he has a poor criminal record; (2) that he believes that he would personally benefit by testifying for the Government in this case. These facts affect the weight that you should give to Johnson's testimony." (Defendant Matthews' Instruction No. 5)

The Court marked all three of the defendant's above noted requests for instructions, "denied".

The Court charged the jury in respect of the witness Clinton Johnson as follows:

"You will recall that the witness Clinton Johnson testified that he participated in certain activities on December 21, 1961, which formed the basis of the charges in the indictment in Counts 2, 3 and 4, and that he has pled guilty to one of these counts. He is what the law refers to as an accomplice.

"Now, anyone who knowingly and voluntarily cooperates with, aids, assists, advises or encourages another in the commission of a crime is an accomplice, and this is true regardless of the degree of his guilt.

"It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the Government has the right to use an accomplice as a witness. It is the duty of the Court to admit the testimony of an accomplice, and that of the jury to consider it.

"It should be received with caution and scrutinized with care. After you have received it with caution and scrutinized it with care, you may then give it such weight as you believe it is entitled to receive. The degree of credit which you give to such testimony is a matter exclusively within your province. You may, as a matter of law, convict a person accused of crime upon the uncorroborated testimony of an accomplice, if you believe the accomplice, but you should do so only after you have carefully and cautiously scrutinized such testimony.

"You are told that if you find that Clinton Johnson believes he will, personally, benefit from testifying for the Government in this case, then the jury, in determining his credibility as a witness, may take that circumstance into consideration."

* * * * *

"When Clinton Johnson testified as a witness for the United States, it was brought out that he has been convicted of committing certain criminal offenses. The jury is the judge, as I have indicated, of the credit and weight to be given to the testimony of each witness; and in passing on the credibility of Clinton Johnson as a witness, his criminal record is one factor the jury may consider along with the usual factors ordinarily considered in determining the credibility of a witness. That is the only purpose for which the jury has been permitted to know of Johnson's criminal record."

* * * * *

"As to any witness was to which the testimony indicates that he is or was a paid informer in respect of this case, you are to scrutinize his testimony with care, and in passing on his credibility, you may consider whether by reason of such employment his testimony was colored in any way."

* * * * *

At the conclusion of the Court's charge an objection was made by Counsel for Matthews, in part, as follows:

"Your Honor, I would object to the failure of the Court to give defendants' instructions as drawn and in the instances where the subject matter of our instructions were not given at all we object to the failure to give the substance of these instructions."

After deliberation, the jury acquitted the defendant Matthews of all charges in the indictment, except Counts 2, 3 and 4. He was found guilty of these counts and was later sentenced to a term of 12 years imprisonment upon the convictions. This appeal follows.

SUMMARY OF ARGUMENT

On December 21, 1961, Clinton Johnson sold a half ounce of heroin to Narcotic Agent Herman H. Scott. This was undisputed at the trial. The appellant was charged with three offenses in connection with this sale upon the theory that he was an aider and abetter. The sole evidence to support this theory of the government was furnished by the testimony of Clinton Johnson; it was not corroborated or supported in any way.

It was shown on cross examination of the witness Johnson that: he had a criminal record; he used marijuana; he was testifying for the government in this case because he wanted to help himself; he had been paid money by the Agent of the Federal Bureau of Narcotics after he agreed to cooperate with the government in this case (he was thus a paid informer); the attorney who represented him in this case was suggested to him by the government attorney who prosecuted this case; he was an accomplice to the offenses about which he gave testimony in this case.

On account of the many infirmities attaching to Johnson that affected his credit as a witness, it was extremely important for the protection of the appellant's rights at the trial that the Trial Court give the Jury adequate and full instructions as to the way that they were to receive Johnson's testimony. The appellant submitted three written requests for instructions on this matter that correctly stated the law. The Trial Court refused to give the instructions as drawn and instead charged the Jury in the Court's own language. The charge that the Court gave the Jury, regarding the testimony of Clinton Johnson, was that the Jury may take into account certain of these facts about Johnson. The Court did not say to the Jury, as required by law that because of these facts about Johnson, it (the Jury) should, ought or must regard Johnson's testimony in a certain way. This was error.

The Court did not give the Jury any instruction touching upon the fact that the witness Johnson was a user of marijuana. This also was error.

ARGUMENT

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY
IN FIRM AND POSITIVE LANGUAGE ABOUT THE WAY THAT
THEY WERE TO RECEIVE AND WEIGH THE TESTIMONY
OF THE GOVERNMENT WITNESS CLINTON JOHNSON

The government's proof in this case clearly showed that on December 21, 1961, Clinton Johnson sold a half ounce of heroin to Narcotic Agent Herman A. Scott. Both Johnson, the seller, and Scott, the buyer, testified that the sale took place. The appellant Charles Matthews was charged with three offenses under the Federal Narcotics Laws in connection with this sale. Admittedly, he was not present when the transaction between Johnson and Scott took place and thus did not actively participate in the same. It was the government's theory that the appellant was responsible on the basis of aiding and abetting. The government sought to establish this theory by showing that at some earlier and other time and place (before the Johnson-Scott transaction) the appellant had sold the drugs to Johnson.

The only evidence connecting the appellant with the offenses was derived from the witness Clinton Johnson. From his lips alone, and from no other source, came the indication of Matthews' participation in the transaction. There was no corroboration, circumstantial or otherwise, to lend support to the testimony of Johnson against Matthews. Johnson's testimony that Matthews gave him the drugs, which he later sold to Scott, is entirely isolated from any other fact shown at the trial. The appellant's fate rested solely on whether the jury did or did not have a reasonable doubt about what Johnson said. The appellant here complains, and asserts an error, that the Trial Court did not afford him a fair trial, in that, under all the circumstances of the case, the court's instruction to the jury about the testimony of Johnson was too passive and mild. The instructions given the jury as to how it was to view and consider the testimony of the witness Johnson, were legally inadequate and insufficient.

As has been seen (in the Statement of Facts part of this brief), it was shown regarding Johnson that: (1) he was a drug user; (2) he had a poor criminal record; (3) he was a drug peddler; (4) he cooperated with the government by testifying before the Grand Jury and as a witness at the trial against Matthews; (5) he gave this cooperation because he believed that he would benefit thereby; (6) he was partially induced to testify against the appellant upon the advice of his attorney, who was suggested to him by the Assistant United States Attorney who prosecuted the case; (7) he was freely given money by agents of the Federal Narcotics Bureau after he indicated that he would cooperate with the government; and (8) he was an accomplice to the offenses about which he testified against Matthews.

In instructing the jury the Trial Court wholly failed to mention that in considering the testimony of the witness Johnson the fact that he was a drug user should be considered as affecting the credit to be given to his testimony. In fact, the court denied the appellant's written request for instructions that included this matter.

Johnson, among other things, was an informer and a drug user. In this jurisdiction, the case of *Fletcher v. United States*, (1946), 81 U.S. App. D.C. 306, 158 F.2d 321, expresses the rule that where the entire case against a defendant depends upon the testimony of a paid informer, the jury should be instructed to scrutinize it closely to determine whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness' own interest. The Court went on further to say that when it additionally appears that the informer is a drug addict it is manifest either that some corroboration of his testimony should be required, or at least it should be received with suspicion and acted upon with caution.

In the circumstances of this case, that is, that Johnson's testimony constitutes the entire case against Matthews and in view of the many legal infirmities attaching to the credibility of this witness, the Court should have required some corroboration of his testimony, or it should have charged the jury very firmly to receive his testimony with suspicion and to act upon it with extreme caution.

The Court failed to give stern and hard cautions to the jury regarding the testimony of Johnson. The Judge did not speak to the jury in compelling and mandatory terms about the way they were to receive and weigh the testimony of Johnson in light of the matters about him that affected his credibility. In its instructions, the Court continuously used the permissive word "may" in speaking about the Jury's duty in assessing Johnson's testimony, for example:

"After you have received it (the testimony of an accomplice) with caution, you may then give it such weight as you believe it is entitled to receive."

* * * * *

". . . if you find that Clinton Johnson believes he will, personally, benefit from testifying for the government in this case, then the jury, in determining his credibility as a witness, may take that circumstance into consideration."

* * * * *

". . . in passing on the credibility of Clinton Johnson as a witness, his criminal record is one factor the jury may consider along with the usual factors ordinarily considered in determining the credibility of a witness."

* * * * *

". . . and in passing on his credibility (of a paid informer), you may consider whether by reason of such employment his testimony was colored in any way." (all emphasis supplied)

In these excerpts the Court was required under the law to use the words "must" or "should" instead of "may". This is not to merely point up nuances of meaning in the use of permissive directions instead of obligatory ones. The difference in meaning between "should" and "may" is real and gravely important to the rights of a defendant who is affected by the testimony of the witness about whom the instructions are given. The law requires that the jury be told that they "should" view, receive, and weigh testimony in a certain way, not that the jury "may" do so. The Court's instructions in this case leaves it to the discretion and whim of the jury to decide how it may act, whereas the law dictates that they must

act in a certain way. Under the law the testimony of an accomplice should be received by the jury with caution; it should be regarded by the jury with suspicion; it ought to be received by them with distrust; it should be weighed with great care; it should be subjected to close scrutiny. *Williams v. United States* (6 Cir., 1962), 300 F.2d 662, 666; *Phelps v. United States*, 252 F.2d 49; *McQuaid v. United States*, 198 F.2d 987, 91 U.S. App. D.C. 229; *Surratt v. United States*, 269 F.2d 240, 106 U.S. App. D.C. 49; *Stephen-son v. United States*, 211 F.2d 702; *Doherty v. United States*, 230 F.2d 605; *Stillman v. United States*, 177 F.2d 607.

The fact that Johnson had a poor criminal record and that he believed that he would personally benefit by testifying for the government affect the weight that the jury should give to his testimony. *United States v. Raimone*, 192 F.2d 861.

The failure of the Court to give a precise instruction on a point of law is not generally considered error in the ordinary case. But in a case such as the instant one, where the conviction of Matthews is based solely upon the uncorroborated words of Johnson, an informer, drug user, twice convicted felon, drug peddler, and accomplice, who is testifying because he believes he will benefit, the rule is otherwise. In the case of *United States v. Persico* (2nd Cir., 1962), 305 F.2d 534, the Court stated as follows:

"The Government's case rested entirely upon the uncorroborated testimony, inconsistent with his earlier testimony in some respects, of an accomplice and co-conspirator who had the strongest possible reasons to become a Government witness. We must therefore scrutinize any claimed error with extreme care since there is grave possibility of prejudice to the defendants in a case such as this by error which might in other circumstances be deemed relatively minor. *Glasser v. United States*, 315 U.S. 60, 67, 62 S.Ct. 457, 86 L. Ed. 680 (1942)."

CONCLUSION

WHEREFORE, it is urged that the Trial Court committed prejudicial error in failing to adequately and sufficiently instruct the Jury regarding how it was to receive and weigh the testimony of the witness Clinton Johnson. This error warrants and justifies a reversal of the conviction of the appellant Charles Matthews in this case and a remand of his appeal to the District Court for a new trial.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17475

CHARLES MATTHEWS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 17557

NORMAN PANNELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 17558

VALERIA PANNELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 2 1963

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QUESTIONS PRESENTED

Appellants Charles Matthews, Norman Pannell, and Valeria Pannell were charged, with four others, with conspiring to violate narcotics laws, and with other substantive offenses in violation of those laws. In the opinion of appellee the following questions are presented:

1. Was the jury properly instructed as to the manner in which it was to consider the testimony of an informant-accomplice?
2. Where the conspiracy count was submitted to the jury, were severances properly denied at the close of the Government's case?
3. Where a Government agent, upon hearing the appellants Pannell state that they were seeking to buy heroin and needed money in order to do so, offered to pay for part or all of the heroin, were the Pannels entrapped?

(1)

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UNITED STATES OF AMERICA, APPELLEE

*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Seven persons were indicted in 22 counts on April 2, 1962, charged with conspiring to violate narcotics laws, and with participation in at least one unlawful transaction involving the concealment, possession and sale of narcotics. Events sur-

rounding each transaction were alleged to have been in furtherance of the conspiracy (J.A. 1-10).

Appellant Matthews was the alleged hub of the narcotics ring. The indictment's theory was that he supplied heroin to his co-conspirators, who thereafter sold it to undercover agents of the Federal Bureau of Narcotics. Appellants Norman Pannell and Valeria Pannell were charged as co-conspirators, and, in three counts, as sellers of heroin on a specific occasion.

The conspiracy count (count 1) charged the three appellants, and Ellen Phelps, Roland Henry, Clinton Johnson and Doris Gardiner, with conspiring to violate the narcotics laws during the period December 21, 1961-February 21, 1962. The indictment set forth 33 acts in furtherance of the conspiracy.

The remaining 21 counts of the indictment concerned 7 specific instances of narcotics trafficking, each transaction giving rise to three counts, in violation of 21 U.S.C. § 174, 26 U.S.C. § 4704(a), and 26 U.S.C. § 4705(a). Counts 2, 3 and 4 involved a sale of heroin by appellant Matthews and Clinton Johnson on December 21, 1961. Counts 5, 6, and 7 involved a sale of heroin by Matthews and Doris Gardiner on January 11, 1962. Counts 8, 9, and 10 involved a sale of heroin by the three appellants, Ellen Phelps, and Roland Henry on January 22, 1962. The remaining counts concerned four separate narcotics sales, occurring on January 26, 1962 and February 8, 20, and 21, 1962. Matthews was charged in each of these counts, with Phelps, Henry, and Gardiner.

Matthews was convicted on counts 2, 3, and 4. The Pannells were convicted on counts 8, 9, and 10. Doris Gardiner was convicted on counts 5, 6, 7 and 11 through 22. Phelps and Henry were acquitted on all counts. Clarence Johnson pleaded guilty to count 3 prior to trial and appeared as a Government witness. Matthews received a twelve year sentence, Norman Pannell a five year sentence, and Valeria Pannell a five year sentence with a recommendation that she be committed to Lexington. (J.A. 236-40.)

The trial

The trial began on September 17, 1962. Appellants had been released on bond in April, 1962. Appellant Matthews

had retained counsel; an attorney was appointed for the Pannells by the District Court. The trial lasted four weeks. The transcript of record exceeds 2,000 pages.

The Government rested its case on September 27, 1962. On that date, the District Court denied appellants' motions for severance and for judgments of acquittal. The case was submitted to the jury on October 10, 1962.

Evidence concerning appellant Matthews

Matthews was convicted of narcotics laws violations arising out of a sale of heroin by Clarence Johnson to a Federal Bureau of Narcotics undercover agent on December 21, 1961. Johnson and the agent, Herman Scott, who was a schoolteacher at time of trial, testified to the December 21 transaction.

Scott's testimony: Operating as an undercover agent and under the "street" name of Ray Wright, Scott telephoned Johnson on December 21, 1961 and asked him if he could obtain a half ounce of heroin. Johnson said yes, on the basis of an earlier conversation he had had with appellant. Johnson told Scott the heroin would cost \$125, and asked him to deliver the money to him at his apartment. Using official funds, Scott delivered \$125 to Johnson at Johnson's apartment a short while later. Johnson told him that he would get the heroin from Matthews.¹ Scott left, having been told by Johnson to telephone him later. Scott telephoned at about noon, and was told by Johnson that appellant Matthews had not yet contacted him. (J.A. 19-22.)

Scott called a short while later, was told by Johnson that Matthews had given him the heroin, and that it was ready for Scott. Scott went to Johnson's apartment, picked up the heroin, had a short conversation with Johnson, and left. Scott had previously bought narcotics from Johnson. (J.A. 21-22.)

Johnson's testimony: Johnson received a call from Scott (Ray Wright), who wanted a half ounce of heroin. Scott was told to call back while Johnson checked on the drug's availability. Johnson called appellant Matthews, and asked if he could buy a half ounce of heroin. Matthews said yes. In a

¹ Scott apparently suggested Matthews as a source of heroin to Johnson, despite his recollection to the contrary at trial. See J.A. 28.

second telephone call, shortly afterward, Matthews told Scott to meet him at a designated location with \$125. Scott, in the interim, delivered the money to Johnson. Johnson met Matthews, delivered the money, and picked up the heroin. Matthews drove away, and Johnson returned to his apartment and called Scott. Scott came to Johnson's apartment and took away the heroin. (J.A. 29-32.)

Johnson had a criminal record resulting from narcotics laws violations. He had smoked marijuana but did not use narcotics. He had been indicted with appellants herein, but pleaded guilty to one count of the indictment. He had been used by the Government, prior to trial, as an informant. He was paid approximately \$200 for his services. At the time of trial, Johnson was under indictment for narcotics offenses in two other cases. (J.A. 33-49.)

Instructions to the jury relevant to the witness Johnson

Matthews requested 19 instructions. Three concerned the witness Johnson. They read as follows:

1. The witness Clinton Johnson who testified in this case for the government is a paid informer and a drug user. You will recall that he admitted to this on the witness stand. In evaluating the testimony given by this witness against the defendant, Charles Matthews, you are instructed that his credibility, as the credibility of all witnesses, is for you to decide. Credibility, ladies and gentlemen of the jury, is the credence or belief that is to be given to a witness' testimony. In the instance where the witness is a paid informer, you are required under the law to scrutinize his testimony clearly for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness' own interest. The requirement that you do so is more strong where it is additionally shown that the paid informer is also a drug user. In such an instance, you are instructed that you should look to see if there is some corroboration of his testimony. That is, to see if there were other and separate facts or circumstances proven in this case that tend to directly or

indirectly establish that the facts about which he testified did occur. Alternatively, you are instructed that the testimony of a paid informer who is also a drug user should be received by you with suspicion and acted upon with caution. (Defendant's Instruction No. 16.)

2. The witness Clinton Johnson who testified in this case for the government was also charged as a defendant in this case. He was charged in Count 1 of this indictment, which charges the conspiracy; and was also named as a defendant in Counts 2, 3 and 4 of the indictment. These latter named counts arise from the sale of one-half ounce of heroin by him to Agent Scott on December 21, 1961. You recall the testimony of the agent and of Mr. Johnson himself regarding this occurrence, and the fact that Johnson has admitted his guilt of these offenses in open Court. Because Mr. Johnson was concerned in the commission of this specific crime, he is what is known in the Law as an "accomplice."

You are instructed as a matter of law that the testimony of an accomplice should be received by the jury with caution. It should be regarded by the jury with suspicion. It ought to be received by the jury with distrust. It should be weighed with great care. It should be subjected to close scrutiny. (Defendant Matthews' Instruction No. 6.)

3. In further regard to the testimony of the witness Clinton Johnson, you will recall that it was proved (1) that he has a poor criminal record; (2) that he believes that he would personally benefit by testifying for the Government in this case. These facts affect the weight that you should give to Johnson's testimony. (Defendant Matthews' Instruction No. 5.)

The trial judge denied the requested instructions.

The trial judge's charge as it concerned Johnson² was as follows:

² There were, in addition, extensive general instructions on the credibility of witnesses.

You will recall that the witness Clinton Johnson testified that he participated in certain activities on December 21, 1961, which formed the basis of the charges in the indictments in Counts 2, 3 and 4, and that he has pled guilty to one of these counts. He is what the law refers to as an accomplice.

Now, anyone who knowingly and voluntarily cooperates with, aids, assists, advises or encourages another in the commission of a crime is an accomplice, and this is true regardless of the degree of his guilt.

It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the Government has the right to use an accomplice as a witness. It is the duty of the Court to admit the testimony of an accomplice, and that of the jury to consider it.

It should be received with caution and scrutinized with care. After you have received it with caution and scrutinized it with care, you may then give it such weight as you believe it is entitled to receive. The degree of credit which you give to such testimony is a matter exclusively within your province. You may, as a matter of law, convict a person accused of crime upon the uncorroborated testimony of an accomplice, if you believe the accomplice, but you should do so only after you have carefully and cautiously scrutinized such testimony.

You are told that if you find that Clinton Johnson believes he will, personally, benefit from testifying for the Government in this case, then the jury, in determining his credibility as a witness, may take that circumstance into consideration. (J.A. 186-87.)

* * * * *

When Clinton Johnson testified as a witness for the United States, it was brought out that he has been convicted of committing certain criminal offenses. The jury is the judge, as I have indicated, of the credit and weight to be given to the testimony of each witness; and in passing on the credibility of Clinton Johnson as a witness, his criminal record is one factor the jury may

consider along with the usual factors ordinarily considered in determining the credibility of a witness. That is the only purpose for which the jury has been permitted to know of Johnson's criminal record. (J.A. 187.)

* * * * *

As to any witness to which the testimony indicates that he is or was a paid informer in respect of this case, you are to scrutinize his testimony with care, and in passing on his credibility, you may consider whether by reason of such employment his testimony was colored in any way. (J.A. 188.)

Matthews objected to the charge:

Your Honor, I would object to the failure of the Court to give defendants' instructions as drawn and in the instances where the subject matter of our instructions were not given at all we object to the failure to give the substance of these instructions. (J.A. 229.)

Evidence concerning appellants Norman and Valeria Pannell

Herman Scott was the only Government witness to testify about the Pannells' sale of heroin to him. On the afternoon of January 22, 1962 he was in the apartment of Estelle Murphy, a special employee of the Federal Bureau of Narcotics (J.A. 50). Murphy knew Scott was an undercover agent (J.A. 61). The Pannells, who were unexpected, entered the apartment. They did not know Scott, and Scott did not know them. Murphy advised them that Scott was "all right" (J.A. 51, 59, 61).

Murphy brought up the subject of narcotics. Scott did not at first participate in the conversation. The Pannells volunteered the information that they had been trying to buy a half ounce of heroin from Matthews, but that they were having difficulty in doing so. Matthews wanted \$110, and the Pannells only had \$80. Scott said: "So Valeria and Norman Pannell discussed the fact that they did not understand why he wouldn't deliver this heroin to them because they were only thirty dollars short, and in the past, they had been dealing with him regular, and that he knew he could get his money from

them" (J.A. 52, 66, 67). (The Pannells' counsel objected to this remark. The objection was overruled (J.A. 52).)

Scott stated:

At this time, I expressed the desire to purchase heroin myself, stating that I did not have connections, Norman was short thirty dollars, and I would be glad to pay the \$110.00 for a half ounce of heroin, or either I would go in with them and pay whatever part he wanted me to. At this time Norman Pannell asked me to give him \$35.00. I gave him \$35.00 of previously listed Government funds; and Norman Pannell attempted to make a phone call. He made one phone call and he asked for Gate [Matthews]; and the person, whoever answered on the other end evidently told him that Gate wasn't in * * * (J.A. 52-53).

He made another phone call; again asked to speak to Gate or Roachie; and at this time, he again told me that he was unable to reach Gate or Roachie, and said he knew where he could find Gate or Roachie, and that he would leave, he would get a taxi. By this time, he left the * * * apartment * * * and I continued to talk with Valeria and the special employee (J.A. 53).

Valeria related to me the fact that Gate was doing her wrong in that he would not let her get the narcotics [sic] for \$30.00 short because she had had a habit and he knew that she had a habit; and she went on to discuss Ellen Phelps, by telling me that Ellen Phelps was part of the organization and that she did supply the heroin or, rather, that she was the brains behind the organization, but she did not like to make deliveries (J.A. 54).

An hour and a half later, Norman Pannell called and reported that he had not made contact with either Gate or Roachie, but would keep trying (J.A. 54). A short while later, Valeria telephoned someone, and then told Scott that "Roachie says that Normal is well [possessed of narcotics]" (J.A. 54-55).

Scott continued:

So Valeria offered to take me where she thought maybe Norman was. She * * * instructed me to drive to 701 24th Street, Northeast. I drove to 701 24th Street,

Northeast, and Valeria got out of the car, and the special employee remained inside with me. She went inside of the building, and in approximately five minutes later, she returned. She came back and told me that Norman was not there. So we returned * * * [to Murphy's apartment] and when we arrived there, Norman was inside the apartment. Went into the bedroom of the apartment, Norman and the special employee, Valeria and myself; and at this time Norman provided me with forty-one capsules of a white powder. I then took Norman and Valeria and the special employee back to 701 24th Street, Northeast. At this time, Valeria and Norman got out of the automobile, and I returned the special employee to her residence, and then I proceeded to the office of the Bureau of Narcotics * * * (J.A. 55).

Scott knew "Gate" [Matthews] only by reputation (J.A. 56). He asked Valeria Pannell who Gate was. He testified: "She advised me that he had a red Ford automobile,* and that he was the father of her child, one of her children" (J.A. 56). The Pannells' counsel asked that the remark be stricken. Government counsel agreed. The trial judge struck the remark and instructed the jury to disregard it (J.A. 57). The Pannells' counsel then moved for a mistrial; the motion was denied (J.A. 57).

The Pannells unsuccessfully moved for severances, and for judgments of acquittal, at the close of the Government's case. They put on no defense. (J.A. 77, 83.)

During the course of its deliberations, the jury requested "the testimony with regard to Norman and Valarie [sic] Pannell." The testimony was read to the jury in the presence of counsel.

* * * * *

The Pannells appeal in *forma pauperis*. The appeals were consolidated for all purposes by this Court on April 3, 1963.

* Federal Bureau of Narcotics Agent Reed testified that on February 15, 1962 he and a fellow agent tailed Matthews' red Ford automobile. Matthews drove to the Pannells' home, picked up Valeria Pannell, and drove her to the area of Benning Road and East Capitol Street (J.A. 70-72).

STATUTES AND RULES INVOLVED

Title 21 U.S.C. § 174 provides:

Same: penalty: evidence.—Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, title I, § 105, 70 Stat. 570.)

Title 26 U.S.C. § 4704(a).—General requirement, provides:

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26 U.S.C. § 4705(a).—General requirement, provides:

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Title 18 U.S.C. § 371 provides:

Conspiracy to commit offense or to defraud United States—

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Rule 8, Federal Rules of Criminal Procedure, provides:

(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14, Federal Rules of Criminal Procedure, provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial

together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Rule 52, Federal Rules of Criminal Procedure, provides:

(a) *Harmless Error*. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error*. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

Appellant Matthews: The trial court instructed the jury that the witness Johnson's testimony was to be received with caution and scrutinized with care, that Johnson's status as a paid informer was relevant to his testimony and could be considered in determining his bias, and that expectations of leniency could be considered as affecting Johnson's credibility. These instructions gave appellant everything he was entitled to. A jury need not, by instruction, be compelled to disbelieve a witness.

Appellants Pannell: Since there was sufficient evidence of a conspiracy to go to the jury, the motions for severance were properly denied. Even had the evidence been insufficient, a severance need not have been granted, since appellants were not prejudiced by joinder.

There was no evidence of entrapment. Appellants were predisposed and eager to traffic in narcotics. They introduced the particular transaction which led to their conviction, and agreed to sell narcotics to a Government agent. If entrapment was present, appellants entrapped the agent.

A general reference at trial to prior dealings between the Pannells and Matthews was admissible in proof of the Pannells' crimes. Evidence as to prior offenses is clearly admissible where the defense of entrapment is raised.

Testimony that appellant Matthews fathered one of appellant Valeria Pannell's children, which testimony was stricken and removed by instruction from the jury's consideration, was not grounds for a mistrial.

ARGUMENT

I. The jury was properly instructed as to the witness Johnson's credibility

Clarence Johnson was a paid informant, a sometime smoker of marijuana, under indictment in two pending criminal cases, appellant Matthews' accomplice, and possessed of a criminal record stemming from violations of the narcotics laws. It was, for the most part, his testimony which proved Matthews' guilt; nobody else saw Matthews in possession of narcotics. (Doris Gardiner did, but her confession was not admissible as evidence against Matthews. See J.A. 77-78.) In these circumstances, Johnson's testimony was the appropriate subject of instructions to the jury. The trial judge could have either instructed the jury that the testimony required corroboration, or that it was to be received with caution and scrutinized with care. *Fletcher v. United States*, 81 U.S. App. D.C. 306, 158 F. 2d 321 (1946).⁴ See *Ballard v. United States*, 99 U.S. App. D.C. 101, 237 F. 2d 582 (1956), *cert. denied*, 352 U.S. 1017.

The jury was instructed that Johnson was an accomplice, and that his testimony "should be received with caution and scrutinized with care." It was told that it might convict upon the uncorroborated testimony of an accomplice, "but you should do so only after you have carefully and cautiously scrutinized such testimony" (J.A. 186).

The jury was also told that "if you find that Clinton Johnson believes he will, personally, benefit from testifying for the Government in this case, then the jury, in determining his credibility as a witness, may take that circumstance into account." It was told that "in passing on the credibility of Clinton Johnson as a witness, his criminal record is one factor which the jury may consider along with the usual factors ordinarily considered in determining the credibility of a witness." The jury was charged that, as to any witness "as to which the testimony indicates that he or she is or was a paid informer in respect of this case, you are to scrutinize his testimony with care, and

⁴ Conviction based on the uncorroborated testimony of an accomplice is proper. *Caminetti v. United States*, 242 U.S. 470 (1917); *Claypole v. United States*, 280 F. 2d 768 (9th Cir. 1960); *Poliasco v. United States*, 237 F. 2d 97, 115 (6th Cir. 1956), *cert. denied*, 352 U.S. 1025.

in passing on his credibility, you may consider whether by reason of such employment his testimony was colored in any way."

General instructions on credibility of witnesses were also given:

In deciding the credit or weight you will give to the testimony of a witness, you may take into consideration the appearance and demeanor and conduct of the witness on the witness stand, and whether the witness impressed you as a truth-telling individual or the contrary. That is simply another way of saying what all of us do in ordinary life. You may consider whether the witness looked and acted as if he or she were telling truthfully, frankly and honestly and freely what the witness knew to be so, or the contrary. You may consider the opportunity or lack of opportunity of a witness to know the matters about which the witness has testified, the reasonableness or unreasonableness of the testimony of a witness, and its probability or improbability. You may consider the contradictions if any in the testimony of a witness. You may take into consideration the frankness or lack of frankness of a witness, and any bias or prejudice which any witness may have displayed, or you may believe any witness has which influenced the judgment of that witness one way or the other. You may take into consideration the friendship or animosity of a witness if any has been shown toward a person or persons concerned in this case, and also any human factors shown by the evidence which to your mind may affect the desire or capability of a witness to tell the truth.

In judging the evidence and determining the credibility of the witnesses, it is the truth which you must seek. Bring to your task your knowledge of human nature and your ability to judge men and women, their intelligence, their motives and their intentions. If you believe that any witness has wilfully testified falsely as to any material matter about which the witness could not reasonably have been mistaken, then you are at liberty to disregard the whole of the testimony of that

witness or such part of it as you believe to be untrustworthy. The law leaves to your good sound judgment the findings of the facts, as well as the determining of the credit and weight you will give to the testimony of each witness who appeared before you (J.A. 185-186).

All these instructions were more than adequate. Indeed, they differ from those appellant proposed in form, not in substance. The witness Johnson underwent searching and lengthy cross-examine (J.A. 33-49). He was on the witness stand for many hours. The jury could choose between belief and disbelief. It chose to believe him. Appellant Matthews' real complaint is with its judgment, and not with the trial judge's instructions.⁵

II. The motions of the appellants Pannell for severances were properly denied

Indicted for conspiracy, the Pannells' joinder with their co-conspirators was proper. *Schaffer v. United States*, 362 U.S. 511, 514 (1962); Fed. R. Crim. P. 8. Since the Government made out a case of conspiracy sufficient to go to the jury,⁶ continued joinder was proper, and the Pannells' motions for severances were properly denied.

Even if the Government's conspiracy case was insufficient, continued joinder was proper, since the appellants were not

⁵ Appellant says that the "Johnson" instructions were "too passive and mild" (Matthews Br. p. 15). He cites no authority for the proposition that criminality, expectations of personal benefit, and a status as a paid informant are factors which *must* be considered by a jury. He does, of course, have authority for the requirement that accomplice testimony "should be received with caution and scrutinized with care." But that is precisely what the trial judge told the jury (J.A. 186).

⁶ Appellants do not seriously urge on this appeal that the trial judge abused her discretion in denying their motions for judgments of acquittal as to the conspiracy charge. They simply aver that "the most that could be said for the evidence of conspiracy is that it showed the existence of three separate conspiracies, one of the appellants with Matthews, Phelps and Henry, a separate one of Doris Gardiner with these three individuals, and possibly a third involving Clinton Johnson" (Appellants Pannell Br. p. 16). It would appear that appellants in fact acknowledge that the jury could have convicted them of conspiracy, together with Matthews, Phelps and Henry, though Gardiner's acquittal would have been appropriate.

prejudiced thereby.⁷ The jury did not confuse proof of the crimes of others with proof of the appellants' guilt, and the verdict reflects separate consideration of the evidence pertinent to each defendant. Significantly, the testimony concerning the Pannells was read to the jury during the course of its deliberations. In this circumstance, it can hardly be said that time, length of trial or number of defendants prevented the jury, in arriving at its verdict, from accurately recollecting the case against the Pannells. Moreover, the evidence against the Pannells was easily segregated; it concerned the events of one day.

The trial judge, too, "was acutely aware of the possibility of prejudice and was strict in [her] charge * * * as to that evidence which was available in the consideration of the guilt of each [defendant] separately under the substantive counts." *Schaffer v. United States*, *supra* at 516. See Transcript, pp. 2018-2020, 2026, 2031-2032, 2055-2057. And see *Lucas v. United States*, 70 App. D.C. 92, 104 F. 2d 225 (1939).

Motions for severances are addressed to the sound discretion of the trial judge, and are subject to review only for clear abuse. *Gori v. United States*, 367 U.S. 364 (1961); *Dykes v. United States*, — U.S. App. D.C. —, — F. 2d — (1962); *Robinson v. United States*, 93 U.S. App. D.C. 347, 210 F. 2d 29 (1954). See *Opper v. United States*, 348 U.S. 84, 95 (1954). Where appellants' motions were made ten days after the trial began, where all counts of the indictment were properly submitted to the jury, where the evidence pertaining to appellants was easily distinguishable from that concerning their co-defendants, and where the trial judge's charge to the jury guarded against any possibility of prejudice, severances were properly denied.

⁷ It seems clear that where Fed. R. Crim. P. 8 is satisfied, recourse to Fed. R. Crim. P. 14 is unavailing. As Justice Douglas stated in dissent in *Schaffer v. United States*, *supra* at 521:

This is unlike the case where the conspiracy count and the substantive counts are submitted to the jury, the verdict being not guilty of conspiracy but guilty on the other counts. Then there is no escape from the quandary in which defendants find themselves. Once the conspiracy is supported by evidence, it presents issues for the jury to decide. What may motivate a particular jury in returning a verdict of not guilty on the conspiracy count may never be known.

III. The Pannells were not entrapped

Appellants attempt to demonstrate on this appeal that the Government's evidence established, as a matter of law, that they were entrapped by Herman Scott. Agent Scott learned from the Pannells that they were negotiating for the purchase of heroin. He asked whether he could purchase some or all of the drug, and he gave them \$35. And that is all he did. His "artifice and stratagem" consisted of his failure to announce that he was an Agent of the Federal Bureau of Narcotics. Surely this silence cannot be equated with entrapment.

Appellants seem to suggest that since they did not first suggest selling heroin to Scott, but rather, that Scott first mentioned the possibility of such a sale, entrapment is established. They are in error." "The fact that government agents 'merely afford opportunities or facilities for the commission of the offense' does not constitute entrapment." *Sherman v. United States*, 356 U.S. 369, 372 (1958), reversing 240 F. 2d 249 (2d Cir.). Appellants continually demonstrated their "ready compliance." *United States v. Sherman*, 200 F. 2d 880, 882 (2d Cir. 1952). They were not merely ready to traffic in narcotics, they were eager. They glowed with "a predisposition or state of mind which readily responds to the opportunity furnished by the officer or his agent to commit the forbidden act. * * *" *Hansford v. United States*, 112 U.S. App. D.C. 359, 303 F. 2d 219 (1962).

* They also argue that where a seller of narcotics obtains the narcotics from a third party, he is not guilty of anything. He is guilty, it is argued, only when he sells from his personal stock, which he must have on hand when the sale is negotiated. The law does not require this. *Adams v. United States*, 220 F. 2d 297 (5th Cir. 1955), relied on by appellant, is clearly not to the contrary. In *Adams*, a woman charged only under 21 U.S.C. § 174 with selling heroin to an informant-addict was acquitted where the evidence gave rise to considerable doubts whether she simply acted as a procuring agent, without profit to herself. In the instant case, appellants made a profit, and were charged under 26 U.S.C. §§ 4704(a) and 4705(a) as well as 21 U.S.C. § 174.

IV. Testimony, if any, as to prior dealings between the appellants Pannell and the appellant Matthews was properly admitted in evidence

The Pannells told Agent Scott that they could not understand why Matthews would not extend them credit, since they "were only thirty dollars short, and in the past, they had been dealing with him regular, and that he knew he could get his money from them" (J.A. 52). Nothing else appears in the record about "dealing with him regular;" the prosecutor did not pursue the matter, the witness did not explain further. There is no testimony as to time, place or circumstance. Only inferentially can it be said that "dealing with him regular" referred to narcotic drugs. This is not "evidence of other offenses" or "evidence of other criminal acts" this Court has discussed in *Harper v. United States*, 99 U.S. App. D.C. 324, 239 F. 2d 945, 946 (1956) and *Bracey v. United States*, 79 U.S. App. D.C. 23, 25, 142 F. 2d 85, 87, *cert. denied*, 322 U.S. 762 (1944). The jury knew of no other offense or other criminal act on the part of the Pannells. Accordingly, whatever the restrictions on the introduction of evidence of such prior criminal acts, they are inapplicable to the case at bar, since they are not invited by the facts. The exclusionary rule seeks to prevent the jury "from leaping from the fact of commission of one crime to the conclusion of the commission of the other." *Harper v. United States*, *supra*, 99 U.S. App. D.C. at 325, 239 F. 2d at 946 (citing an example where the prior offense of murder is brought into a mail fraud case). In the instant case, the jury had before it no prior criminal act from which to leap.

In any event, Agent Scott's testimony was proper. There are many exceptions to the rule which excludes evidence of offenses other than the one charged. Such evidence is admissible where the other offenses are so blended that proof of the crime charged incidentally involves proof of the others; where proof of other offenses explains the circumstances of the crime charged; where such proof establishes a common scheme or purpose; where such proof establishes guilty knowledge, intent, or motive. *Bracey v. United States*, *supra*, 79 U.S. App. D.C. at 25, 142 F. 2d at 87. Significantly, proof of other offenses is admissible to establish a disposition to commit the crime, which

disposition is particularly relevant where the defense of entrapment is raised. *Bracey v. United States, supra*; *Hansford v. United States, supra*. In the instant case, testimony as to prior regular dealings with Matthews by the Pannells could be considered insofar as it tended to show the Pannells' plan to commit the offenses with which they were charged, and the jury was so instructed:

Such testimony was admissible only insofar as it might tend to show a plan by the aforesaid defendant[s] to commit the offenses with which they are charged in the indictment. And such testimony is not to be considered by you for any other purpose (J.A. 216).

V. Valeria Pannell's motion for a mistrial was properly denied

Agent Scott testified that he asked Valeria Pannell who "Gate" [Matthews] was. She answered that he owned a red Ford and that he was the father of one of her children. (Matthews used this Ford, the evidence suggested, in distributing narcotics. See J.A. 70-72.) Valeria asked that the remark be stricken. It was. The jury was told to disregard it. Valeria then moved for a mistrial. The motion was denied, properly.

Assuming, *arguendo*, the inadmissibility of the remark (there is nothing on the record, though, which indicates that the Matthews-Valeria Pannell child was born out of wedlock), the trial judge's instructions were adequate to dispel whatever prejudice Valeria might have suffered. Where (a) the existence of prejudice can be debated, (b) the essentials of the case are unaffected, and (c) the instructions to the jury are prompt and clear, there are no grounds for a mistrial. See *Delli Paoli v. United States*, 352 U.S. 232, 242 (1957).

CONCLUSION

Wherefore, it is respectfully submitted the judgments of the District Court be affirmed.

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JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,475

CHARLES MATTHEWS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 17,557

NORMAN PANNELL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

APR 24 1963

No. 17,558

Nathan J. Paulson
CLERK

VALERIA PANNELL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

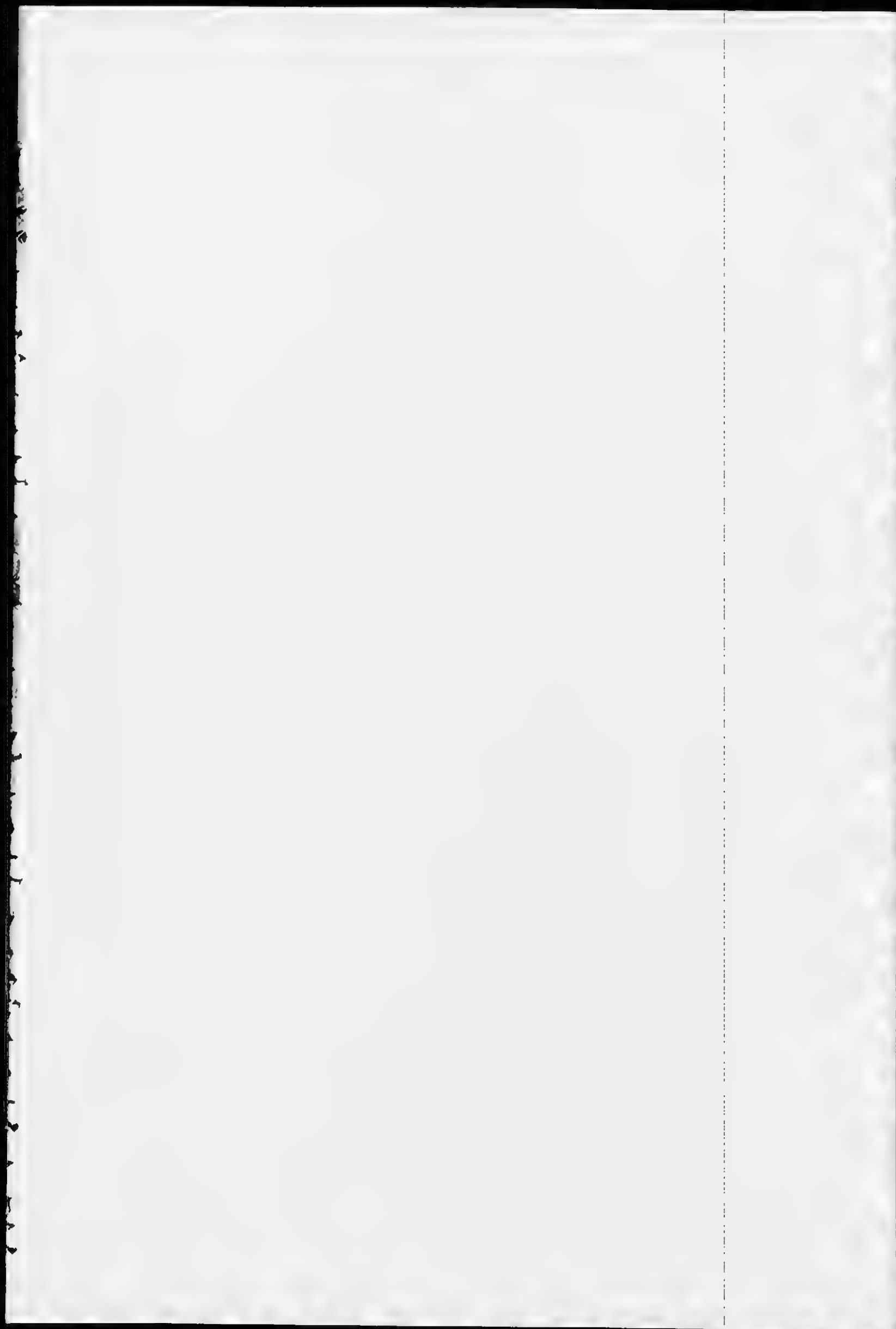


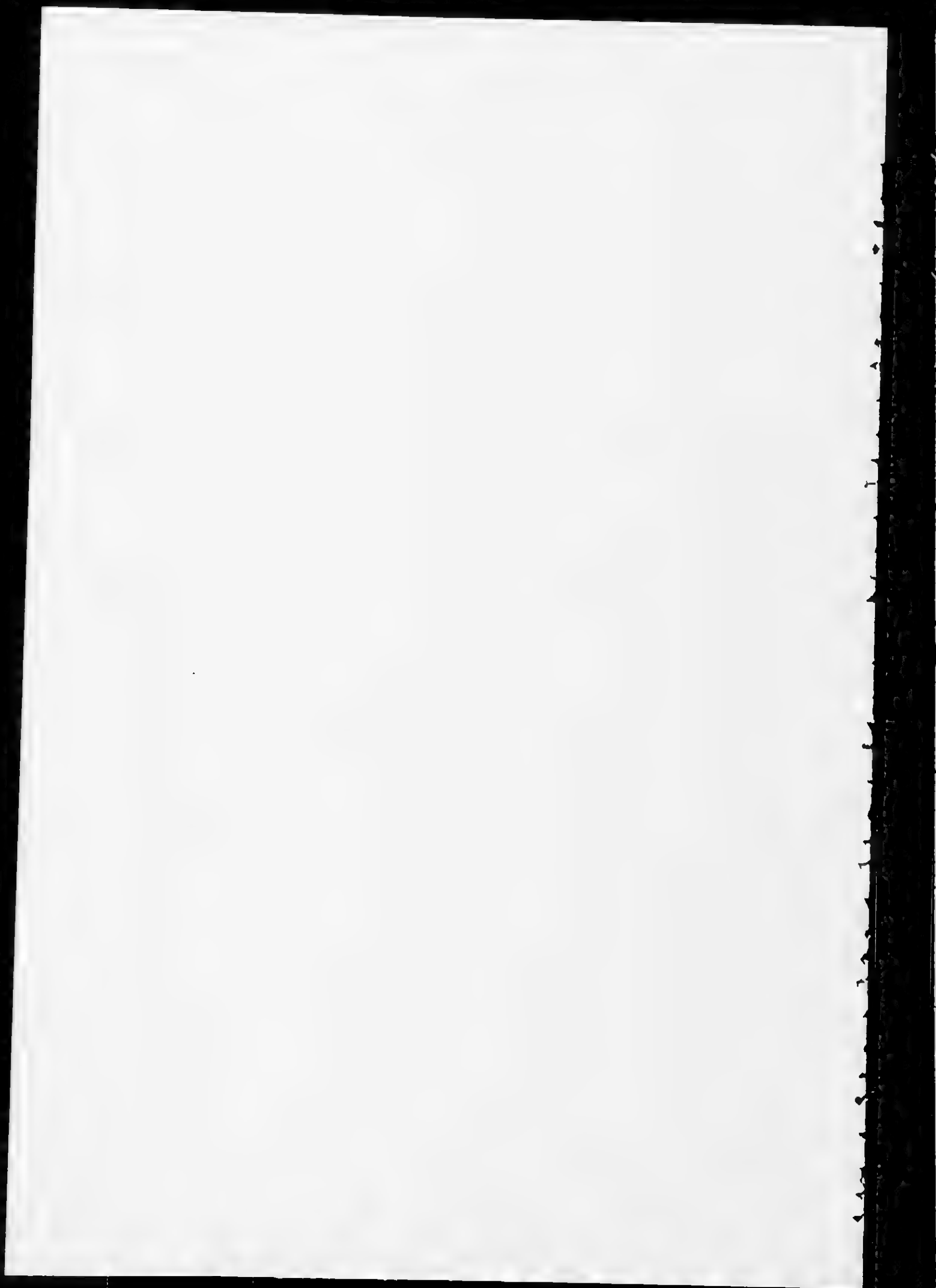
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JOINT APPENDIX

[Filed April 2, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on March 6, 1962.

The United States of America	)	Criminal No. 289-62
)	
v.	)	Grand Jury No. 298-62
)	
Charles Matthews	)	Violation: 18 U.S.C. 371
	)	(Conspiracy to Commit Offenses
Ellen M. Phelps	)	against the United States.)
)	
Roland R. Henry	)	26 U.S.C. 4705(a), 4704(a), and
	)	21 U.S.C. 174
Norman Pannell)	
	)	(Sale, unlawful possession, and
Valeria Pannell, also known	)	facilitation of concealment and sale
as Valeria Knight	)	of narcotic drugs, knowing same to
	)	have been imported, contrary to law.)
Clinton Johnson)	
)	
Doris L. Gardiner)	

The Grand Jury charges:

Commencing on or about December 21, 1961, and continuously until on or about February 21, 1962, within the District of Columbia, and at other places unknown to the Grand Jury, Charles Matthews, Ellen M. Phelps, Roland R. Henry, Norman Pannell, Valeria Pannell, also known as Valeria Knight, Clinton Johnson and Doris L. Gardiner, the defendants herein, and divers other persons unknown to the Grand Jury, unlawfully, feloniously, wilfully, and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the laws of the United States, and to defraud the United States, that is, in violation of Title 26, United States Code, Section 4705(a) and Title 21, United States Code, Section 174.

It was a part of said conspiracy that said defendants did sell, barter, exchange and give away quantities of narcotic drugs, that is, heroin hydrochloride, not in pursuance of written orders, written for

that purpose, as provided by law, in violation of Title 26, United States code, Section 4705(a).

It was a further part of said conspiracy that said defendants facilitated the concealment and sale of narcotic drugs, that is, heroin hydrochloride, after said heroin hydrochloride had been imported, with the knowledge of said defendants, into the United States contrary to law, in violation of Title 21, United States Code, Section 174.

OVERT ACTS

At the times and places hereinafter mentioned, within the District of Columbia, and elsewhere, the said defendants committed, among others, the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about December 21, 1961, within the District of Columbia, the defendant Clinton Johnson called the defendant Charles Matthews on the telephone.

2. On or about December 21, 1961, within the District of Columbia, the defendant Charles Matthews called the defendant Clinton Johnson on the telephone.

3. On or about December 21, 1961, within the District of Columbia, the defendant Clinton Johnson met the defendant Charles Matthews.

4. On or about December 21, 1961, within the District of Columbia, the defendant Charles Matthews delivered to the defendant Clinton Johnson a quantity of heroin hydrochloride.

5. On or about December 21, 1961, within the District of Columbia, the defendant Clinton Johnson delivered to Herman H. Scott a quantity of heroin hydrochloride.

6. On or about January 1, 1962, within the District of Columbia, the defendant Charles Matthews had a conversation with the defendant Doris L. Gardiner.

7. On or about January 10, 1962, within the District of Columbia, the defendant Charles Matthews met the defendant Doris L. Gardiner.

8. On or about January 10, 1962, within the District of Columbia,

the defendant Charles Matthews delivered to the defendant Doris L. Gardiner a quantity of heroin hydrochloride.

9. On or about January 11, 1962, within the District of Columbia, the defendant Doris L. Gardiner delivered to Thomas E. Broadnax, Jr. a quantity of heroin hydrochloride.

10. On or about January 17, 1962, within the District of Columbia, the defendant Charles Matthews met the defendant Doris L. Gardiner.

11. On or about January 17, 1962, within the District of Columbia, the defendant Charles Matthews delivered to the defendant Doris L. Gardiner a quantity of heroin hydrochloride.

12. On or about January 22, 1962, within the District of Columbia, the defendants Norman Pannell and Valeria Pannell, also known as Valeria Knight, had a conversation with Herman H. Scott.

13. On or about January 22, 1962, within the District of Columbia, the defendant Valeria Pannell, also known as Valeria Knight, had a conversation with Herman H. Scott.

14. On or about January 22, 1962, within the District of Columbia, the defendant Norman Pannell delivered to Herman H. Scott a quantity of heroin hydrochloride.

15. On or about January 26, 1962, within the District of Columbia, the defendant Doris L. Gardiner made a telephone call to the defendant Charles Matthews.

16. On or about January 26, 1962, within the District of Columbia, the defendant Charles Matthews delivered to the defendant Doris L. Gardiner a quantity of heroin hydrochloride.

17. On or about January 26, 1962, within the District of Columbia, the defendant Doris L. Gardiner delivered to Thomas E. Broadnax, Jr. a quantity of heroin hydrochloride.

18. On or about January 29, 1962, within the District of Columbia, the defendant Roland R. Henry delivered to the defendant Doris L. Gardiner a quantity of heroin hydrochloride.

19. On or about February 1, 1962, within the District of Columbia, the defendant Roland R. Henry delivered to the defendant Doris L.

Gardiner a quantity of heroin hydrochloride.

20. On or about February 8, 1962, within the District of Columbia, the defendant Doris L. Gardiner made a telephone call to the defendant Charles Matthews.

21. On or about February 8, 1962, within the District of Columbia, the defendant Doris L. Gardiner made a telephone call to the defendant Ellen M. Phelps.

22. On or about February 8, 1962, within the District of Columbia, the defendant Roland R. Henry delivered to Doris L. Gardiner a quantity of heroin hydrochloride.

23. On or about February 8, 1962, within the District of Columbia, the defendant Doris L. Gardiner delivered to Thomas E. Broadnax, Jr. a quantity of heroin hydrochloride.

24. On or about February 20, 1962, within the District of Columbia, the defendant Doris L. Gardiner made a telephone call to the defendant Charles Matthews.

25. On or about February 20, 1962, within the District of Columbia, the defendant Charles Matthews drove the defendant Ellen M. Phelps in an automobile to 1818 Benning Road, N.E.

26. On or about February 20, 1962, within the District of Columbia, the defendant Ellen M. Phelps delivered to the defendant Doris L. Gardiner a quantity of heroin hydrochloride.

27. On or about February 20, 1962, within the District of Columbia, the defendant Doris L. Gardiner delivered to Thomas E. Broadnax, Jr. a quantity of heroin hydrochloride.

28. On or about February 21, 1962, within the District of Columbia, the defendant Doris L. Gardiner made a telephone call to the defendant Charles Matthews.

29. On or about February 21, 1962, within the District of Columbia, the defendant Charles Matthews drove the defendant Ellen M. Phelps in an automobile to 1818 Benning Road, N.E.

30. On or about February 21, 1962, within the District of Columbia, the defendant Charles Matthews met the defendant Doris L. Gardiner.

31. On or about February 21, 1962, within the District of Columbia, the defendant Doris L. Gardiner met the defendants Charles Matthews and Ellen M. Phelps.

32. On or about February 21, 1962, within the District of Columbia, the defendant Ellen M. Phelps delivered to the defendant Doris L. Gardiner a quantity of heroin hydrochloride.

33. On or about February 21, 1962, within the District of Columbia, the defendant Doris L. Gardiner delivered to Thomas E. Broadnax, Jr. a quantity of heroin hydrochloride.

SECOND COUNT:

On or about December 21, 1961, within the District of Columbia, the defendants Charles Matthews and Clinton Johnson did sell, barter, exchange and give away to Herman H. Scott, a narcotic drug, that is, a mixture totaling 7,520 milligrams of heroin hydrochloride and mannitol, not in pursuance of a written order, written for that purpose, from the said Herman H. Scott, as provided by law.

THIRD COUNT:

On or about December 21, 1961, within the District of Columbia, the defendants Charles Matthews and Clinton Johnson purchased, sold, dispensed and distributed, not in the original stamped package, and not from the original stamped package, a narcotic drug, that is, a mixture totaling 7,520 milligrams of heroin hydrochloride and mannitol. This is the same heroin hydrochloride which is mentioned in the second count of this indictment.

FOURTH COUNT:

On or about December 21, 1961, within the District of Columbia, the defendants Charles Matthews and Clinton Johnson facilitated the concealment and sale of a narcotic drug, that is, a mixture totaling 7,520 milligrams of heroin hydrochloride and mannitol, after said heroin hydrochloride had been imported, with the knowledge of the defendants Charles Matthews and Clinton Johnson, into the United States, contrary to law. This is the same heroin hydrochloride which is mentioned in the second and third counts of this indictment.

FIFTH COUNT:

On or about January 11, 1962, within the District of Columbia, the defendants Charles Matthews and Doris L. Gardiner did sell, barter, exchange and give away to Thomas E. Broadnax, Jr., a narcotic drug, that is, a mixture totaling 370 milligrams of heroin hydrochloride, milk sugar and mannitol, not in pursuance of a written order, written for that purpose, from the said Thomas E. Broadnax, Jr., as provided by law.

SIXTH COUNT:

On or about January 11, 1962, within the District of Columbia, the defendants Charles Matthews and Doris L. Gardiner purchased, sold, dispensed and distributed, not in the original stamped package, and not from the original stamped package, a narcotic drug, that is, a mixture totaling 370 milligrams of heroin hydrochloride, milk sugar and mannitol. This is the same heroin hydrochloride which is mentioned in the fifth count of this indictment.

SEVENTH COUNT:

On or about January 11, 1962, within the District of Columbia, the defendants Charles Matthews and Doris L. Gardiner facilitated the concealment and sale of a narcotic drug, that is, a mixture totaling 370 milligrams of heroin hydrochloride, milk sugar and mannitol, after said heroin hydrochloride had been imported, with the knowledge of the defendants Charles Matthews and Doris L. Gardiner, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the fifth and sixth counts of this indictment.

EIGHTH COUNT:

On or about January 22, 1962, within the District of Columbia, the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry, Norman Pannell and Valeria Pannell, also known as Valeria Knight, did sell, barter, exchange and give away to Herman H. Scott, a narcotic drug, that is, a mixture totaling 1,500 milligrams of heroin hydrochloride and mannitol, not in pursuance of a written order, written for that purpose, from the said Herman H. Scott, as provided by law.

NINTH COUNT:

On or about January 22, 1962, within the District of Columbia, the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry, Norman Pannell and Valeria Pannell, also known as Valeria Knight, purchased, sold, dispensed and distributed, not in the original stamped package, and not from the original stamped package, a narcotic drug, that is, a mixture totaling 1,500 milligrams of heroin hydrochloride and mannitol. This is the same heroin hydrochloride which is mentioned in the eighth count of this indictment.

TENTH COUNT:

On or about January 22, 1962, within the District of Columbia, the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry, Norman Pannell and Valeria Pannell, also known as Valeria Knight, facilitated the concealment and sale of a narcotic drug, that is, a mixture totaling 1,500 milligrams of heroin hydrochloride and mannitol, after said heroin hydrochloride had been imported, with the knowledge of the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry, Norman Pannell and Valeria Pannell, also known as Valeria Knight, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the eighth and ninth counts of this indictment.

ELEVENTH COUNT:

On or about January 26, 1962, within the District of Columbia, the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry and Doris L. Gardiner did sell, barter, exchange and give away to Thomas E. Broadnax, Jr., a narcotic drug, that is, a mixture totaling 17,680 milligrams of heroin hydrochloride and mannitol, not in pursuance of a written order, written for that purpose, from the said Thomas E. Broadnax, Jr., as provided by law.

TWELFTH COUNT:

On or about January 26, 1962, within the District of Columbia, the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry and Doris L. Gardiner purchased, sold, dispensed and distributed,

not in the original stamped package and not from the original stamped package, a narcotic drug, that is, a mixture totaling 17,680 milligrams of heroin hydrochloride and mannitol. This is the same heroin hydrochloride which is mentioned in the eleventh count of this indictment.

THIRTEENTH COUNT:

On or about January 26, 1962, within the District of Columbia, the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry and Doris L. Gardiner facilitated the concealment and sale of a narcotic drug, that is, a mixture totaling 17,680 milligrams of heroin hydrochloride and mannitol, after said heroin hydrochloride had been imported, with the knowledge of the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry and Doris L. Gardiner, into the United States, contrary to law. This is the same heroin hydrochloride which is mentioned in the eleventh and twelfth counts of this indictment.

FOURTEENTH COUNT:

On or about February 8, 1962, within the District of Columbia, the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry and Doris L. Gardiner did sell, barter, exchange and give away to Thomas E. Broadnax, Jr. a narcotic drug, that is, a mixture totaling 10,110 milligrams of heroin hydrochloride and mannitol, not in pursuance of a written order, written for that purpose, from the said Thomas E. Broadnax, Jr., as provided by law.

FIFTEENTH COUNT:

On or about February 8, 1962, within the District of Columbia, the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry and Doris L. Gardiner purchased, sold, dispensed and distributed, not in the original stamped package, and not from the original stamped package, a narcotic drug, that is, a mixture totaling 10,110 milligrams of heroin hydrochloride and mannitol. This is the same heroin hydrochloride which is mentioned in the fourteenth count of this indictment.

SIXTEENTH COUNT:

On or about February 8, 1962, within the District of Columbia, the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry

and Doris L. Gardiner facilitated the concealment and sale of a narcotic drug, that is, a mixture totaling 10,110 milligrams of heroin hydrochloride and mannitol, after said heroin hydrochloride had been imported, with the knowledge of the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry and Doris L. Gardiner, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the fourteenth and fifteenth counts of this indictment.

SEVENTEENTH COUNT:

On or about February 20, 1962, within the District of Columbia, the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry and Doris L. Gardiner did sell, barter, exchange and give away to Thomas E. Broadnax, Jr., a narcotic drug, that is, a mixture totaling 9,550 milligrams of heroin hydrochloride and mannitol, not in pursuance of a written order, written for that purpose, from the said Thomas E. Broadnax, Jr., as provided by law.

EIGHTEENTH COUNT:

On or about February 20, 1962, within the District of Columbia, the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry and Doris L. Gardiner purchased, sold, dispensed and distributed, not in the original stamped package, and not from the original stamped package, a narcotic drug, that is, a mixture totaling 9,550 milligrams of heroin hydrochloride and mannitol. This is the same heroin hydrochloride which is mentioned in the seventeenth count of this indictment.

NINETEENTH COUNT:

On or about February 20, 1962, within the District of Columbia, the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry and Doris L. Gardiner facilitated the concealment and sale of a narcotic drug, that is, a mixture totaling 9,550 milligrams of heroin hydrochloride and mannitol, after said heroin hydrochloride had been imported, with the knowledge of the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry and Doris L. Gardiner, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the seventeenth and eighteenth counts of this indictment.

TWENTIETH COUNT:

On or about February 21, 1962, within the District of Columbia, the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry and Doris L. Gardiner did sell, barter, exchange and give away to Thomas E. Broadnax, Jr., a narcotic drug, that is, a mixture totaling 9,790 milligrams of heroin hydrochloride and mannitol, not in pursuance of a written order, written for that purpose, from the said Thomas E. Broadnax, Jr., as provided by law.

TWENTY-FIRST COUNT:

On or about February 21, 1962, within the District of Columbia, the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry and Doris L. Gardiner purchased, sold, dispensed and distributed, not in the original stamped package, and not from the original stamped package, a narcotic drug, that is, a mixture totaling 9,790 milligrams of heroin hydrochloride and mannitol. This is the same heroin hydrochloride which is mentioned in the twentieth count of this indictment.

TWENTY-SECOND COUNT:

On or about February 21, 1962, within the District of Columbia, the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry and Doris L. Gardiner facilitated the concealment and sale of a narcotic drug, that is, a mixture totaling 9,790 milligrams of heroin hydrochloride and mannitol, after said heroin hydrochloride had been imported, with the knowledge of the defendants Charles Matthews, Ellen M. Phelps, Roland R. Henry and Doris L. Gardiner, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the twentieth and twenty-first counts of this indictment.

/s/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ Alexander [Illegible]
Foreman.

[Filed April 6, 1962]

UNITED STATES)

vs.)

1 - Charles Matthews)

3 - Roland R. Henry)

5 - Valeria Pannell)

Defendants)

Criminal No. 289-62

Charge: Vio. Fed. Narc. Laws,
Conspiracy to violate Fed.
Narc. LawsPLEA OF DEFENDANT

On this 6th day of April, 1962, the defendants 1 - Charles Matthews, 3 - Roland R. Henry, appearing in proper person and by his attorney 1 - John Shorter, Jr., 3 - Without counsel, 5 - Appoint counsel, being arraigned in open Court upon the indictment, the substance of the charge being stated to each, pleads not guilty thereto.

Copy of indictment given to the defendants Henry and Pannell.

Bond is increased as to the defendant Pannell from \$2500 to \$5,000.

The defendant Pannell is remanded to the District Jail.

By direction of

Matthew F. McGuire
Presiding Judge
Criminal Court # Assignment

* * *

* * *

[Filed April 6, 1962]

UNITED STATES)

vs.)

2 - Ellen M. Phelps)

4 - Norman Pannell)

7 - Doris L. Gardiner)

Defendants)

Criminal No. 289-62

Charge: Vio. Fed. Narc. Laws

PLEA OF DEFENDANT

On this 6th day of April, 1962, the defendants 2 - Ellen M. Phelps, 4 - Norman Pannell, 7 - Doris L. Gardiner, appearing in proper person

and by his attorney 2 - John Shorter, 4 - Stanley A. First, 7 - William A. Tinney, Jr., being arraigned in open Court upon the indictment, the substance of the charge being stated to each, pleads not guilty thereto.

The defendants Pannell and Gardiner are remanded to the District Jail.

By direction of

Matthew F. McGuire
Presiding Judge
Criminal Court # Assignment

* * *

* * *

[Filed September 17, 1962]

WITHDRAWAL OF PLEA

[No. 7: Clinton Johnson]

On this 17th day of September, 1962, the defendant Clinton Johnson, appearing in proper person and by his attorney William A. Tinney, Jr., Esquire, in open Court withdraws his plea of not guilty to the indictment heretofore entered and pleads guilty to Count (3) three.

The defendant is permitted to remain on bond pending the Probation report.

By direction of

Burnita Shel Matthews
Presiding Judge
Criminal Court # 1.

* * *

* * *

UNITED STATES OF AMERICA) Criminal No. 289-62
 v.)
 CLINTON JOHNSON) September 17, 1962, 11:45 a.m.

P L E A

BEFORE: Honorable BURNITA SHELTON MATTHEWS
 APPEARANCES: Frederick Smithson, Assistant U.S. Attorney
 William A. Tinney, Jr., for defendant

P R O C E E D I N G S

* * * * *

THE COURT: Is there any other representation that any of the other attorneys want to make before we begin the case?

MR. TINNEY: Now, if Your Honor please, I also represent Clinton Johnson, who is a defendant in this case. I represented him since the inception of this case. I entered my appearance, I believe, some time after this indictment was returned. He came to my office and retained me and I am still his attorney. I have advised him fully in this matter and I have advised him to enter a plea of guilty to the third count of this indictment.

THE COURT: Well, now, let's see, Clinton Johnson is named in counts one, two, three and four, and he proposes to plead guilty to what?

MR. TINNEY: To the third count of this indictment.

2 MR. SMITHSON: This is satisfactory to the government, Your Honor. The government would recommend the acceptance of this plea on behalf of the defendant Clinton Johnson with regard to count three and I believe that satisfactory justice would ensue as a result of acceptance of the plea.

THE COURT: You are Clinton Johnson, are you not?

THE DEFENDANT: Yes, I am.

THE COURT: Do you understand what this charge is in count three?

THE DEFENDANT: Yes, Ma'am.

THE COURT: The charge is that on or about the 21st of December, 1961, within the District of Columbia, that certain defendants, and your name is mentioned among them, purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, a mixture totaling 7,520 milligrams of heroin hydrochloride and mannitol. Your understand the charge?

THE DEFENDANT: Yes, ma'am.

THE COURT: Mr. Clerk, will you ask the defendant the usual questions.

THE CLERK: Have you been advised and do you understand that you have a right to a speedy trial by jury with the aid of counsel?

THE DEFENDANT: Yes, I do.

THE CLERK: Do you understand that you will have no such right if your plea of guilty is accepted?

THE DEFENDANT: That is right.

3 THE CLERK: Do you understand that you will have the assistance of counsel at the time of sentence if your plea is accepted?

THE DEFENDANT: Yes.

THE CLERK: Do you understand that you are charged with violation of the narcotic laws and did you commit that crime?

THE DEFENDANT: I did.

THE CLERK: Has your plea of guilty been induced by any promises by anyone as to what sentence will be imposed by the Court?

THE DEFENDANT: No, it hasn't.

THE CLERK: Have you been threatened or coerced by anyone into entering a plea of guilty?

THE DEFENDANT: No, I haven't.

THE CLERK: Have any promises of any kind been made to you by anyone to induce a plea of guilty?

THE DEFENDANT: No.

THE CLERK: Have you been advised as to the maximum sentence that may be imposed?

THE DEFENDANT: No.

THE CLERK: No?

THE DEFENDANT: Not the maximum, I haven't.

THE COURT: I guess we should get the code.

Will you go and get me 18 United States Code (to the messenger).

4 THE CLERK: Do you understand the consequences of entering a plea of guilty?

THE DEFENDANT: Yes.

THE CLERK: Are you entering the plea of guilty voluntarily and of your own free will because you are guilty and for no other reason?

THE DEFENDANT: That is right.

THE CLERK: Have you discussed your plea fully with your attorney?

THE DEFENDANT: I have.

THE CLERK: Are you completely satisfied with the services of your attorney?

THE DEFENDANT: Yes, I am.

THE COURT: Just a moment and we will have this volume here. Is this defendant in jail or on bond?

MR. SMITHSON: He is on bond, Your Honor.

MR. TINNEY: He is on bond.

THE COURT: How much is the bond?

MR. TINNEY: The present bond is \$3,500, Your Honor please, covering this indictment. This defendant is also on personal bond, if Your Honor please, I am frank to tell the Court, in two other cases in which he has cooperated with the government, and I say this for the record again, that I have advised him to testify, if called upon to do so. This man has also been before the Grand Jury and testified, before I entered this case. That is right, isn't it, Mr. Johnson?

5 THE DEFENDANT: Yes, it is.

MR. SMITHSON: I might state to Your Honor, the government will represent to the Court that it is the desire of the government,

although I know it is very strange in a narcotic case, that this defendant be continued on bond pending his probation report.

THE COURT: Is this defendant an addict?

MR. TINNEY: He is not an addict, if Your Honor please.

MR. SMITHSON: I will say candidly, Your Honor, the government is going to identify him as a witness.

(The Court conferred with the clerk.)

MR. SMITHSON: I believe it is 7237.

THE COURT: I think it is 4704 -- no, 4705.

MR. SMITHSON: There is no penal section with that. The penal section is in 7237 of Title 26, and in this defendant's case, it is not less than ten nor more than forty years.

THE COURT: Now, just a minute. What section?

MR. SMITHSON: 7237, Your Honor, as amended.

MR. SHORTER: Your Honor will find that in Title 26, rather than Title 18.

THE COURT: Title 26 is what I have.

Ask them for the volume behind this one, send this volume back and get the one that follows this (to the messenger).

You all might just as well have a seat.

MR. JOHNSON: In the meantime, just for the record --

6 THE COURT: I would rather not, right now; I will be glad to hear you after we have finished this.

(The messenger returned with a book.)

THE COURT: What is the section number again?

MR. SMITHSON: 7237. It is in two parts, (a) and (b), and I believe in this particular one it is (a), but I am not positive of that.

THE COURT: I still don't have the right book.

THE MARSHAL: Which one do you want?

THE COURT: The one that follows this (indicating); bring this one back, too.

(The marshal returned with some books.)

THE COURT: Is this in an advance sheet?

MR. SMITHSON: No, Your Honor, it is the result of the Narcotic Control Act of 1956 and it is an amendment to the 1954 Internal Revenue Code.

THE COURT: Well, I don't know what volume it is in.

MR. MITCHELL: Your Honor, may I be of help to the Court?

THE COURT: Yes.

MR. MITCHELL: I have it (handing book to the Court).

THE COURT: Thank you.

MR. MITCHELL: You are welcome.

THE COURT: Well, now, this simply says where no specific penalty is otherwise provided.

7 MR. SMITHSON: That is correct, Your Honor. The specific penalty, Your Honor, is provided for the written order form section and this is the section which is covered in there, and this is a multiple -- I should say a second offender or more in this case and, therefore, the sentence or time is not less than ten nor more than forty years, so his sentence would be somewhere between ten and forty years.

THE COURT: You mean that this defendant has a previous conviction?

MR. SMITHSON: That is correct, Your Honor.

THE COURT: That is not in this jacket, is it?

MR. SMITHSON: No, it wouldn't be shown, Your Honor, except by an information.

THE COURT: Is this defendant through with the sentence in 542-55?

MR. SMITHSON: I am not certain on that, Your Honor, I believe he is.

(Mr. Tinney spoke to Mr. Smithson.)

Mr. Tinney informs me that he is. I say, Your Honor, that this defendant is named a defendant in two other matters and I might state to the Court that the government understands he is going to be a witness for the government in these cases.

THE COURT: Well, Mr. Johnson, you have heard what has been said about this penalty?

THE DEFENDANT: Yes, I have.

THE COURT: Do you still want to plead to this count?

8 You know, you are entirely free, if you want to, to have a trial, to stand on your plea of not guilty and to have a trial by jury of twelve persons with the assistance of counsel, if you so desire.

THE DEFENDANT: No, ma'am.

THE COURT: What do you want?

THE DEFENDANT: I would rather plead guilty.

THE COURT: What is it?

THE DEFENDANT: I would rather plead guilty to the charge.

THE COURT: Very well. You may take his plea to count three.

THE CLERK: Clinton Johnson, in Criminal case 289-62, in which you are charged with a violation of the narcotic laws, do you wish to withdraw your plea of not guilty heretofore entered and enter a plea of guilty to count three?

THE DEFENDANT: That is right.

MR. SMITHSON: At this time, Your Honor, the government does urge that the defendant be allowed to remain on bond pending the probation report.

THE COURT: Very well. Sentence will be deferred pending a report from the probation office.

1	United States of America)	
	v.)	Criminal No. 289-62
	Charles Matthews,)	
	Ellen M. Phelps,)	
	Roland R. Henry,)	
	Norman Pannell,)	
	Valeria Pannell,)	
	Doris L. Gardiner,)	
	Defendants.)	

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D.C.,
Tuesday, Sept. 18, 1962.

The above-entitled cause came on for further hearing before the
HONORABLE BURNITA SHELTON MATTHEWS, United States District
Judge, and a jury, at 11:25 a.m.

* * * * *

3 HERMAN H. SCOTT

was called as a witness by the Government and, having been duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMITHSON:

Q. Your name, sir, is Herman H. Scott, is that correct? A.
That is correct.

Q. Mr. Scott, I would like to direct your attention to around the
21st of December of 1961. Were you employed at that time, sir? A.
Yes, I was.

Q. What was your employment? A. I was employed as a narcot-
ics agent, Federal Bureau of Narcotics, stationed at Washington, D.C.

Q. Washington, D.C.? A. That is correct, yes.

Q. This was on the 21st of December 1961? A. Yes, that is
correct.

Q. And I will ask you, sir, if at that time you knew a person by
the name of Clinton Johnson? A. Yes, I did.

Q. And how long had you known him? A. Approximately two months.

4 Q. Two months? A. Two months, yes.

Q. On the 21st of December 1961, I will ask you if you had a conversation with Clinton Johnson? A. Yes, I did.

Q. Was that in person or on the telephone? A. I had a telephone conversation with him. I later conversed with him in person.

Q. What time was the telephone conversation? A. Approximately 10:35 a.m.

Q. Where were you when you called? A. I was at the office of the Bureau of Narcotics, located in the Internal Revenue Building.

Q. Did you make the call? A. Yes, I did.

Q. What number did you call? A. I don't recall the number.

Q. All right. Do you know where it was located? A. Yes. The telephone was located in Apartment 40, at 1401 Girard Street, Northwest, Washington, D.C.

Q. Now, sir, I will ask you if the number 332-3408 means anything to you? A. Yes. As I recall, I am almost positive that is the number that I dialed, the number that Clinton Johnson had furnished me on previous occasions.

5 Q. Did you speak with anyone at that phone? A. Yes, I did.

Q. With whom? A. I spoke with Clinton Johnson.

Q. You recognized his voice? A. Yes, I did.

Q. I will ask if your conversation dealt with narcotics?

* * * * *

7 A. I telephoned Clinton Johnson on this morning and I asked him if he could get me a half ounce of heroin. Clinton Johnson told me that he could because he had spoken to Gate Matthews earlier in the morning, and told me that it would cost me \$125 and asked me to bring the money over to his apartment.

Q. When you had this conversation, sir, this was over the phone, I believe you have heretofore indicated? A. That is correct.

8 Q. And this person of Gate Matthews was identified to you by Clinton Johnson by name? A. Yes; by name.

Q. And pursuant to that conversation did you do anything, go anywhere? A. Yes. I left the office of the Bureau of Narcotics with \$125 of official government money which I had previously recorded and proceeded to 1401 Girard Street where I entered Apartment 40 and met Clinton Johnson. At this time I gave Clinton Johnson \$125 and he told me to call him later as he was expecting --

* * * * *

9 Q. Will you continue, Mr. Scott, with it. A. Clinton Johnson told me that he was expecting a telephone call from Gatemouth Matthews in approximately twenty minutes and told me to call him later. I did and left the apartment and returned to the office of the Bureau of Narcotics.

Q. Did you call again? A. Yes. I called at twelve noon. At this time I spoke to Clinton Johnson and he told me he had not heard from Matthews and told me to call back in approximately a half hour.

Q. Did you call again? A. Yes. At approximately 1:40 p.m. I again called Clinton Johnson. Clinton Johnson told me to come up to his apartment, that he had just left Gatemouth Matthews and had received the heroin.

Q. Sir, at the time you gave the money to Clinton Johnson, in his apartment, or any time with regard to this date of December 21, 1961, did you give him a written order form for any narcotics? A. No, I did not.

Q. Did you go to his apartment, sir? A. Yes, I did.

10 Q. What time did you arrive, if you recall? A. Approximately 2:15 p.m.

Q. This is the same apartment 40 at 1401 Girard? A. That is correct.

Q. Northwest section? A. Northwest, Washington, D.C.

Q. Did you go in there? A. Yes, I did.

Q. Did you have any conversation at that time? A. Yes. When

I walked in Clinton Johnson pointed out a white glassine envelope that was lying on a coffee table in his apartment. He told me there it is, and told me to pick it up. I picked up the glassine envelope and placed it in my jacket pocket, jacket I was wearing, placed it in the pocket, and then I had a conversation with Clinton, telling him I was leaving the city, going to Florida for Christmas holidays and that I might try and purchase other narcotics from him prior to my leaving. At this time he told me it would be okay, just to give him a telephone call. I then left and returned to the office of the Bureau of Narcotics.

Q. At the time you saw this on -- I believe you identified as a coffee table? A. Yes, sir.

* * * * *

17

CROSS EXAMINATION

BY MR. SHORTER:

* * * * *

24

Q. You were telling us, sir, that you recall that it was approximately November 21st that you first met Clinton Johnson? A. I think it was about that time, yes.

Q. Could it have been September 21st, 1961, sir, when you were sold your cocaine? A. It could have been.

Q. You do remember? A. I remember purchasing a bottle of cocaine from Clinton Johnson.

* * * * *

25

Q. Now, did you not also, sir, on September 22nd, 1961, purchase a vial of cocaine from Mr. Johnson?

MR. SMITHSON: What was that date, Counsel?

MR. SHORTER: September 22nd.

A. I cannot be sure of the date but I do remember buying a second vial of cocaine from Clinton Johnson, yes.

Q. For the enlightenment of the jury, would you kindly tell us what cocaine is? A. Cocaine is a narcotic drug usually used in the medical profession, and this particular type of cocaine that I purchased was of a liquid nature.

Q. This was an illegal transaction, was it not? A. It was, yes.

Q. Now, you had purchased heroin from Mr. Johnson prior to December 21, 1961, hadn't you, sir? A. Yes, I had.

Q. As a matter of fact you purchased 25 capsules of heroin from him on December 14, 1961, did you not? A. Again, I am not sure of the date, but I am sure I purchased 25 capsules of heroin from Clinton Johnson.

Q. For which you paid him \$25? A. Correct.

Q. This also took place at 14 -- A. -- 01 Girard Street.

Q. Apartment 40? A. Correct.

* * * * *

27 Q. Mr. Scott, in the course of seeing Mr. Johnson on these several occasions, which we have established, that is, September 21, 1961, September 22, 1961, December 14, 1961, did you ever see him in the company of any other person? A. Yes, I did.

* * * * *

28 Q. How many times, in all, up to and including the date of December 21, 1961, did you ever see Mr. Johnson with the defendant, Mr. Matthews? A. I have never seen Mr. Johnson with Mr. Matthews.

Q. Not even up to this time? A. Not even up to this time.

Q. Well now, when Mr. Johnson told you, as you have related to us earlier, that some narcotics that he gave to you on December 21st, and which have been marked as Government Exhibits No. 1, 1-A, 1-B and 1-C for identification, when he told you that he had gotten these from Mr. Matthews, you had no way of being certain that that was the fact,

29 did you, sir? A. No, I did not.

Q. Except through what he said to you? A. Correct.

Q. Now, as far as is known to you, no member of your Bureau saw Mr. Johnson and Mr. Matthews together on that date, did they, sir? A. I can not testify to that.

Q. Well now, it is a fact, sir, when you were talking to Mr. Johnson on the morning of December 21, on the telephone, that is, when you were at the Narcotics Bureau at Tenth and Pennsylvania Avenue and

you called his telephone number, at about 10:45 in the morning, Mr. Ivan Wurms was present, was he not? A. Yes, he was.

Q. Mr. Wurms is also an agent of the Federal Narcotics Bureau, isn't he? A. That is correct, yes.

Q. An officer and agent of considerably more experience than yourself, is he? A. Correct, yes.

Q. Now, the first time that you called Mr. Johnson, at about 10:35, I think you said it was? A. Correct.

30 Q. Mr. Wurms was in the office? A. Correct.

Q. Well now, could you again, sir, tell us what was said between you and Mr. Johnson at the time you first called him at 10:35, 10:45?

A. Well, to the best of my knowledge, I asked Clinton Johnson if he could get me a half ounce of heroin. Clinton Johnson told me that he could as he had spoken with Gatemouth, and told me to bring him \$125 and that he would be able to get me the heroin.

Q. When you were telling us about this on direct examination, on questioning by Mr. Smithson, when you got to the part about referring to some person, you said Gatemouth Matthews. Were you purporting at that time to be telling what Mr. Johnson was saying, or was this an addition of yours, Gatemouth Matthews. A. Mr. Johnson told me that at one time Matthews. I didn't know who Matthews was.

Q. I am asking you about the conversation you had with him at this time, sir. I am not asking you to elaborate in any way with respect to this question. I am asking you whether when you were testifying on direct examination, when you said that Mr. Johnson said something about Gatemouth Matthews, whether or not you were editing what he said, or whether or not you were purporting to tell us exactly what he

31 said. A. I was not quoting Mr. Johnson.

Q. So Mr. Johnson did not use the word Gatemouth Matthews at all? A. No.

Q. Any impression that was created in this courtroom is not really a fact? A. No. You didn't want me to give an explanation, so therefore --

Q. We are not asking for explanation. We are asking for testimony,

Mr. Witness. A. What I was about to say was he did use the word Matthews but I didn't know who Matthews was.

Q. Did he use the word Matthews on the morning of December 21, 1961, when you talked to him at 10:25? Yes or no. A. At 10:35 I can't -- I don't think he did at 10:35, no.

Q. Your answer is you don't think he did? A. No, he did not as far as I am concerned, at 10:35.

* * * * *

34 Q. Now, the next morning -- let me say this: In the conversation that Mrs. Murphy had with Mr. Johnson, the early morning hours of December 21, 1961, an arrangement was made for you to call Mr. Johnson in the morning about purchasing a half an ounce of heroin? A. The
35 special employee told Clinton Johnson that I would telephone him on the following morning.

Q. About the purchase of a half an ounce? A. About the purchase of a half ounce of heroin, correct.

Q. And that was the first conversation that you were telling us about that you had with Mr. Johnson on that morning, that is, December 21, 1962? A. Yes. Telephone call I made at 10:35 a.m. on December 21, 1961.

Q. Is it not a fact, sir, that in the course of this conversation it was you who mentioned the word "Gate," not Gatemouth Matthews, but the word "Gate," and not Mr. Johnson? A. That is probably correct, yes.

* * * * *

Q. Well now, at what time did you next call Mr. Johnson that morning? A. I next called him at twelve noon.

36 Q. Where were you at that time? A. I was again in the office of the Bureau of Narcotics.

Q. Now at that time, sir, had you taken him \$125 to purchase this half ounce of heroin? A. I had.

Q. Now, in the course of this second conversation with Mr. Johnson, is it not correct, sir, that it was you and not Mr. Johnson who

mentioned the word "Gate"? A. No; this time Mr. Johnson told me that he was awaiting a telephone call from Gate.

Q. From who, sir? A. From Gate; Gatemouth, and Charles Matthews.

Q. I want you to tell me exactly what he said, because you have had us believe that the first time you used all that description it was a part of interpolation on your part. I want you to tell us exactly, as best you can recall, what Mr. Johnson said to you when you called him at noon. A. I thought you were talking about at this time when I was in the house with Johnson. I thought you were talking about that conversation.

Q. I am talking about the telephone call. A. The telephone call, he only told me Gate had not called. He was still waiting on his telephone call.

37 Q. Now, I ask you again, so that we might be clear on this matter, did Mr. Johnson use the word, or mention the name Gate, Gate-mouth, or Gatemouth Matthews, in this telephone conversation that took place between you and him at about noon on December 21, 1961? A. To my recollection, he used Gate, at the twelve noon conversation.

Q. Now was this telephone call, sir, monitored by anyone or by any device so far as you know? A. So far as I know, I don't recall.

MR.SHORTER: May I have this marked as Defendant Matthews' Exhibit No. 1 marked for identification.

THE COURT: Yes.

THE DEPUTY CLERK: Defendant Matthews' Exhibit 1 marked for identification.

(Two-page document marked Defendant Matthews' Exhibit No. 1 for identification.)

BY MR. SHORTER:

Q. Now, sir, I show you what has been marked as Defendant Exhibit No. 1 for identification, and ask you whether or not you can recognize that two-page document? A. Yes, I can.

Q. Now, is that not, sir, a statement signed by you and made by you in the nature of an official report of the activities that took place

between you and Mr. Johnson on December 21, 1961? A. Correct.

38

Q. Now I call your attention, sir, to the second page of that document, and particularly to paragraph 5 thereof. A. Right.

Q. A reading of that paragraph, sir, does it not refresh your recollection as to whether or not the conversation that you had with Mr. Johnson, at about noon on the day in question, was transcribed or overheard by another agent? A. It states here that the conversation was also recorded by narcotics Agent Wurms.

Q. Was recorded? A. Was recorded.

Q. Now, to make certain that we are clear, this is the same conversation that you are telling me, in which Mr. Johnson used the name or used the word "Gate"? A. Correct.

Q. He used it and not you, sir? A. I said he used it. I didn't say that I did not use it. I said he used it.

Q. He used it? A. Yes, sir.

MR. SHORTER: May we come to the bench, Your Honor?

THE COURT: Yes.

* * * * *

39

BY MR. SHORTER:

Q. Agent Scott, you will notice from the exhibit that I have just handed you, which is Defendant's Exhibit No. 1 for identification, that on the morning of December 21, 1961, you had several telephone conversations with Mr. Johnson, correct? A. Correct, yes, sir.

Q. Now, the first one was at 10:35? A. Correct.

Q. That was monitored by Agent Wurms? A. Correct.

Q. Could you kindly tell us when the second conversation was had between the two of you over the telephone and which was monitored by some other agent? A. Twelve noon.

Q. Was this the next succeeding conversation, or was there one in between that was not monitored? A. No. This was the very next conversation by phone.

Q. This was after you had given Mr. Johnson \$125? A. That is right.

Q. When was the next time that you had a telephone conversation with Mr. Johnson? A. 1:40 p.m.

Q. Was that phone call monitored? A. Yes, it was.

40 Q. So the first three calls that you had with Mr. Johnson were monitored? A. Correct.

MR. SHORTER: Mr. Smithson, may I call upon you to render us a playing of these records?

* * * * *

41 THE COURT: All right. They may be played.

MR. SMITHSON: May I ask Agent Wurms to come in then?

THE COURT: Yes.

MR. SMITHSON: May the witness step down? Do you want the witness excluded?

MR. SHORTER: I think he should hear them.

MR. SMITHSON: I think he should too, Mr. Shorter, I want to make sure there is no objection.

MR. SHORTER: I think Mr. Thompson is the operator of the machine.

MR. SMITHSON: Mr. Wurms did the recording.

* * * * *

HERMAN A. SCOTT

resumed the witness stand and was examined and further testified as follows:

BY MR. SHORTER:

Q. Mr. Scott, I trust you were listening attentively when Mr. Wurms was playing the telephone transcripts of those conversations?

A. I was.

42 Q. Now, how many times did you hear Mr. Johnson mention the name "Gate," "Gatemouth," or "Gatemouth Matthews"? A. Not one.

Q. Well now, as a matter of fact, the several times it was mentioned, it was mentioned by you? A. That is correct.

* * * * *

205

Washington, D.C.
Wednesday,
September 19, 1962

* * * * *

207

CLINTON JOHNSON

was called as a witness by the Government and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMITHSON:

Q. Your name is Clinton Johnson, is that correct? A. That is correct.

Q. Mr. Johnson, are you the same Clinton Johnson who is named as a co-conspirator and as a defendant in Criminal case 289-62 together with one Charles Matthews, Ellen Phelps, Roland Henry, Norman Pannell, Valeria Pannell, and Doris Gardiner? A. Yes.

* * * * *

209

Q. Directing your attention to the 21st of December of 1961, did you know a person by the name of Ray or the nickname of Ray?

A. Yes, I do.

Q. And have you since learned his true name? A. Yes, I have.

Q. You learned it to be what? A. Raymond Scott. Herman H. Scott, I think it is.

Q. And at that time, sir, on December 21, 1961, did you know him to be a narcotic agent at that time? A. No, I didn't.

Q. I will ask you if on December 21st of 1961, you had any telephone conversation with this Herman Scott known to you as Ray?

A. Yes, I did.

Q. Do you recall what time of the day or night the conversation was? A. It was in the morning, around 10:00 or 10:30.

* * * * *

210 Q. What was the conversation as you can recall it?

A. Well, I received a call from him. He asked me if I can get him a half ounce of heroin. And I told him that he would have to call me back later, that I have to make a call and find out first. So I made the call --

* * * * *

211 Q. Now, he called you and you were requested to get a half ounce of heroin? A. Yes, I was.

Q. And in that conversation, sir, was there any mention of any individual from whom you were to obtain this narcotic?

* * * * *

A. Yes, it was. He asked me if I can get anything from Gate. And I told him I would try. And he will call me back later.

Q. By "Gate," whom do you mean, or whom did you mean?

* * * * *

212 Q. No. Whom did you mean? Who did you know, or did you know someone by the name of Gate? A. Yes, I did.

Q. Who was that? A. Charles Matthews.

Q. That is the same Charles Matthews? A. Yes, it is.

* * * * *

213 Q. Now, sir, following this call from Ray, or Agent Scott, relative to this narcotics, did you call anyone? A. Yes, I did.

Q. Whom did you call? A. I called Charles Matthews.

* * * * *

214 Q. Did you reach the defendant Matthews on that number?

A. Yes, I did.

215 Q. What conversation did you have with the defendant Matthews at that time relative to narcotics, if any?

* * * * *

A. Well, I asked him if I can purchase a half ounce of heroin. And he said yes; that he would call me back in a few minutes. So I hung up. In about a half an hour he called me back.

Q. Did you have a conversation at that time with him relative to narcotics? A. Yes, I did.

Q. And what was that conversation?

* * * * *

216 A. The conversation was that he did have it, and that he would meet me in about a half an hour, and for me to meet him at Thirteenth and Girard Street, Northwest.

Q. Now, sir, in between the call that you made to him and his call back, I believe you said was about a half hour, had you had any conversation either on the phone or in person with Herman Scott?

A. Yes, he called me back.

Q. All right. Did you see Herman Scott that day? A. Yes, I did.

Q. And about what time was it? A. I met him around 11:30, quarter till twelve. Came by and brought the money.

Q. How much money did he give you, sir? A. One hundred twenty-five dollars.

Q. Did he give you any written order form for narcotics, sir? A. No, sir.

Q. And now when you say the defendant Matthews called you and told you that he had it and to meet him at 1301 Girard Street, or Thirteenth and Girard, I should say, about what time was that?

A. I imagine around 12:30.

Q. What time were you to meet him there? Did he say, or did you know? A. He said in about twenty minutes to a half hour.

217 Q. And after this conversation did you go anywhere? A. Yes, I met him at Thirteenth and Girard Street.

Q. By "him", do you mean the defendant Matthews? A. That is right.

Q. Would you relate to us what was said or done at the time you met the defendant Matthews at Thirteenth and Girard Street?

A. Well, when I got there I had been a little late. I imagine I took

longer than the thirty minutes, and he was there. He was waiting when I got there. So when I got there I gave him the money and he told me that I was a little late, that he placed the heroin over in the bushes, and for me to go over there and pick it up.

Q. What did you do? A. I went over and picked it up. It was under a brown paper bag. And after he saw that I had it he drove off.

Q. He drove off? A. Yes, sir.

Q. Tell me, sir, at the time you saw him there was he on the street or in a vehicle? A. He was in a car.

Q. What kind of a car was it, sir? A. I think it was a '61 Cadillac.

* * * * *

218 Q. After you received this narcotic, suspect narcotic -- pardon me, from the defendant Matthews, what did you do with it? A. I returned home and waited for Scott to come by.

Q. Did you have any conversation in person or on the telephone with Scott after you received this narcotic? A. Yes, I did.

Q. Was that in person or on the telephone? A. On the telephone.

Q. Did you call him or did he call you? A. He called me.

Q. What was the conversation, please. A. He wanted to know had I received it yet and I told him that I had. And he said that, Are you sure it's Gate's? And I said, well, yes. And he said, well, I will be right up.

Q. And did you see him? A. Around two o'clock, 2:15 he came by.

219 Q. And did you give him anything, or did he receive anything while he was there? A. Yes. I gave him a half ounce of heroin.

Q. Did you hand it to him, sir? A. No. I had it on the coffee table. He picked it up off the coffee table.

* * * * *

CROSS EXAMINATION

BY MR. SHORTER:

Q. Mr. Johnson, are you the same Clinton Johnson who on June 6, 1950, was indicted in case number 18574, United States District Court for the District of Maryland, charging violations of illegally selling heroin and illegally possessing marihuana and who was sentenced on May 12, 1950 for four and a half years? A. I am.

Q. And are you also the same Clinton Johnson who was arrested on April 26, 1955, on complaint of one Frederick Wilson of the Federal Narcotics Bureau, on a complaint that you did unlawfully acquire marihuana without having paid the transfer taxes as required by law, indicted in one count for that offense, found guilty by a jury on June 29,
220 1955, and on July 1, 1955, sentenced to a period of from two to seven years in the penitentiary? A. Yes.

* * * * *

Q. Did you receive a good-time release on May 26, 1960, sir?
A. That was the date.

* * * * *

222 Q. Now, at the time that you were released from the penitentiary in May of 1960, there was an unexpired portion of your sentence to be served, was there not, sir? A. Yes, it was.

Q. And your release was a good-time release? A. Right.

Q. Now, when was your sentence due to expire, sir?

A. January 1st, 1961 -- '61.

Q. 1962? A. Yes.

Q. And what you are telling us took place -- well, until the expiration of your full sentence in January of 1962, were you supposed to have been or were you actually under the supervision of any agency in the District of Columbia? A. Yes, I was.

Q. Would you tell us what that agency is? A. The Parole Board.

* * * * *

227 Q. Let me ask you this: Do you recall selling Herman Scott a vial of cocaine September 21, 1961? A. I can't recall that.

Q. You can't recall that? A. I can't recall that date. Maybe I did.

Q. You have sold him some cocaine? A. Yes.

* * * * *

230 Q. You were first arrested for a narcotics offense in the year 1950? A. Right.

Q. Now, I take it that 1950 was the first year that you began to sell drugs, possess drugs, or have any contact with them? A. That was the first time I was arrested for drugs, yes.

Q. That was the first time you had ever even had any drugs? A. No, I wouldn't say that.

231 Q. When was the first time? A. I had had drugs before that, before '50. 'Fifty was the first time I was arrested for it.

Q. How far back before the year '50? A. The year 1949.

Q. When you first became in contact with narcotics, was it by using them? A. No.

Q. Have you ever used narcotics? A. No, I haven't. I have never used heroin, or cocaine. I have smoked marihuana.

Q. You make a distinction. When I asked you whether or not you used drugs and you said no, I haven't used cocaine or heroin but I have used marihuana. The answer to the question is you have used narcotic drugs? A. Marihuana. The narcotic drug marihuana, I have.

MR. SMITHSON: He is asking for the witness to define what is a narcotic. May I be heard, Your Honor?

THE COURT: I think the witness has answered the question.

BY MR. SHORTER:

Q. Is marihuana a narcotic drug? A. I have heard the contention that it was, and it was not. That is the reason I made the --

Q. What do you say about it?

232 MR. SMITHSON: Objection, Your Honor.

THE COURT: The objection is sustained.

BY MR. SHORTER:

Q. Well, when you smoke marihuana did it affect you in any way, sir? A. Yes, it did.

Q. You get an intoxicating effect from it? A. Yes.

Q. And that was the reason you were smoking it? A. Right.

Q. Now, how long a period of time did you smoke marihuana from the time you first began? A. Periodically. It wasn't a regular thing.

Q. When was the last time you used some marihuana?

A. In '61.

Q. What month in 1961? A. I can't recall the month. It was sometime before Christmas. October or November.

* * * * *

233 Q. Now, when did you first go back to handling drugs or being connected with drugs or having contact with narcotic drugs following your release in 1960? A. If I can recall correctly, it was in the month of July or August 1961.

* * * * *

235 Q. When you first went back to dealing in narcotics in August of 1961, sir, were you using drugs? A. I wasn't using heroin or cocaine. Like I stated before, at that time I might have smoked marihuana.

Q. You might have smoked some? A. Yes, sir. In that particular month that you are speaking of, I might have. It wasn't a regular thing with me.

Q. Well now, when you first started dealing in drugs in 1961, what were you dealing in? A. In 1961?

Q. Yes. When you went back to dealing in drugs. A. It was marihuana.

Q. You were selling marihuana, sir? A. That is right.

236 Q. You were selling some and using some? A. I was mostly selling.

Q. You were using some too, weren't you? A. Yes.

Q. Well now, when was it that you began to deal in some other drug, after you started back to dealing in it? A. Either the latter part of August or the beginning of September.

Q. Now, when you started back to dealing in drugs in August of 1961, does that mean to say that you were in a narcotic ring, or were you selling drugs? A. I was selling drugs.

Q. You were selling them, sir? A. Yes.

Q. When you say marihuana, were you selling bags of marihuana or marihuana cigarettes? A. Cigarettes.

Q. That you yourself would prepare, sir? A. That is right.

Q. You would roll up? A. That is correct.

Q. Put in paper? A. Correct.

Q. And go out on the street and sell to various people? A. No.

237 Q. You would stay in your house and sell? A. Right.

* * * * *

238 Q. Well now, how long did you sell narcotics, sell marihuana out of your apartment or out of your room, or wherever it was you were
239 living at the time? A. How long?

Q. Yes, sir. A. From that time until the time that I was arrested.

Q. In January? A. In January 1962.

Q. January 17, 1962? A. Right.

Q. You never stopped, sir? A. Well, yes.

Q. You never stopped from the time you started until the time you were caught? A. Yes, sir. There were times that I had to stop, because of supply. I couldn't acquire it.

Q. But you didn't really stop, you were just waiting for another supply? A. Yes.

Q. Well now, you got access to some cocaine, we have learned, during this period too, did you not? A. Right.

Q. You also got access to some heroin? A. That is correct.

Q. Now, you were selling, during six or seven-month period, marihuana, cocaine and heroin? A. That is correct.

* * * * *

246 Q. At the time of your arrest, you were arrested on January 17, 1962, at an alley near 1401 Girard Street, Northwest? A. That is correct.

Q. And at the time you were arrested, what did you have in your possession, sir? A. I had nothing. No narcotics at all.

247 Q. You didn't have 141 capsules of drugs? A. At the time of my arrest, I did not.

Q. What did they do, take you up to your apartment and found the drugs there? A. They did; that is correct.

Q. You didn't have them right on you, but you did have them?
A. In my apartment.

Q. You had them? A. In my apartment.

Q. They were yours, weren't they? A. That is true.

Q. And how many capsules was it, sir? A. I understand it to be one hundred forty-some capsules.

Q. You understand? A. That is correct. I didn't count them.

Q. You didn't know how many you had? A. That is correct.

Q. Well now, tell us, sir, when it was that you decided to become a witness in this case? A. If I am not -- I think it was either in February or March 1962.

Q. Will you be a little more explicit about it, sir? A. I am not sure which month it was. But it was either in February or March.

248 The latter part of February or the beginning of March.

* * * * *

Q. Well now, when Mr. Wurms arrested you, where did he take you? A. Back to my apartment.

Q. After they finished searching your premises, where were you taken, sir? A. To the Commissioner's office.

249 Q. And was a bond fixed for you at the Commissioner's office, sir? A. Yes, there was.

Q. What was that bond? A. Thirty-five hundred dollars.

Q. Three thousand five hundred dollars? A. Yes, it was.

Q. And at that time you had not consented to be a witness for the Government or to give the Government any information? A. No, I didn't.

Q. And your bond was thirty-five hundred dollars? A. That is right.

Q. You have been charged in two other cases, haven't you, sir? A. Yes.

Q. You were charged with this in a case by yourself involving the December 14th transaction, and you were indicted in two conspiracy cases, were you not, sir? A. That is correct.

Q. Now, in connection with these indictments, you were to the grand jury, did you not, sir? A. That is true.

250 Q. You testified as a witness for the Government before the grand jury? A. That is correct.

Q. Now, you were indicted and charged in these two indictments? A. Yes; I think I was.

Q. What bond was set for you in those two cases, sir?

A. As far as I know, it was the same bond. Thirty-five hundred dollars.

Q. Did you pay any bondsman a premium on a thirty-five hundred dollar bond in either one of your two conspiracy cases, sir?

A. No.

Q. Isn't it a fact, sir, that you were permitted to remain on personal bond in both of those cases? A. That can be true. As far as I know, I was out on \$3500 bond.

* * * * *

251 Q. Well, if I tell you that you are out on personal bond, sir,
252 on your own personal recognizance, according to the records
in the cases, could you then tell me who arranged this for you? Who
recommended this? A. Who recommended it?

Q. Yes, sir. A. I think Mr. Smithson.

Q. Mr. Smithson sitting here recommended it, correct?

A. As far as I know.

* * * * *

253 Q. Following your arrest on January 17, 1962, you are telling
us that you were taken from your apartment to the United States
Commissioner's office? A. That is right.

Q. And that Commissioner set a bond? A. That is correct.

Q. Now, did you go any place with the officers, that is, Wurms
and Thompson, after the Commissioner's hearing? A. No.

Q. Did you obtain your release on bail? A. After I left from
down -- from the Commissioner's office and went to the jail, District
Jail.

Q. How long did you stay in the District Jail? A. Overnight.

254 Q. During the time you were first in custody, up until the time
you were released, did you have any conversation with Mr. Wurms or
Mr. Thompson or any member of the Federal Narcotics Bureau, or
any member of the United States Attorney's office? A. They questioned
me.

Q. What did you tell them, sir? A. Nothing.

THE COURT: Keep your voice up.

A. When they were first questioning me where I had acquired this
heroin and what not from.

Q. You didn't tell them anything? A. No.

* * * * *

255 Q. When did you first employ an attorney after your release?

A. I think it was March. I think it was in March, either April. I am not sure.

Q. Is that before or after you were indicted in Criminal case number 214-62?

* * * * *

257 Q. Now, March 16, you appeared in open court to answer this indictment, that is, to plead to the indictment, which is known as arraignment? A. Right.

Q. And at that time the record shows an attorney, a gentleman named Mr. William A. Turney, appeared as your attorney? A. Right.

Q. This is on March 16, 1962. Do you remember this?

A. Yes, I think I do.

Q. Do you remember employing Mr. Turney to represent you?

A. Yes.

258 Q. When did you employ Mr. Turney in relation to the time that you came to the arraignment with him? A. Well, I think it was in March. A little before I was to be arraigned.

Q. And when I say engaged, you actually employed him?

A. That is true.

Q. No one employed him for you, sir? A. No.

Q. You paid him with your funds? A. That is correct.

Q. And these funds had not been supplied by anyone? A. No.

Q. The money that you had worked for? A. That is true.

Q. And was it this money that you had worked for and earned legally, sir? A. Yes, it was.

Q. Well now, at the time that you were indicted, and you answered this indictment, you had not agreed to become a witness in this case, had you? A. I am not sure. This was in March. And I think it was in March when I agreed.

Q. I am trying to fix the time that you made this agreement. I am not concerned about the extent of the agreement or any of the contents of it. A. I understand.

259 Q. Let me ask you this: Did you agree to become a witness in this case before or after you employed Mr. Turney? A. I think it was before. I agreed before I obtained Mr. Turney.

Q. And that, of course, would have been before you were indicted in this case, or before you answered the indictment in this case on March 16? A. I think it was.

Q. Well, are you certain that you had agreed to become a witness before you employed Mr. Turney? A. Yes.

Q. You are certain of that? A. Yes.

Q. Now, after your release, and up until the time that you employed Mr. Turney, you were living at home, were you not?

A. That is true.

Q. You were out on bail? A. That is correct.

Q. Now, who was the first person who approached you, sir, about being a witness for the Government? A. I think it was Mr. Wurms.

Q. Mr. Ivan Wurms, Federal Narcotic agent? A. Yes.

260 Q. Now, where were you when you and Mr. Wurms had this conversation? A. I think I was at home and he called me and asked me if I would come down and talk with him at the Internal Revenue Building.

* * * * *

261 Q. Well now, how long after you were released on bond was it that Mr. Wurms called you? A. I imagine it was anywhere from two to three weeks.

Q. Is that the end of January or the first of February?
A. Somewhere along there.

Q. Near the first of February? A. Yes.

Q. Now, at the time of your arrest, and when you were advised that you were being charged with selling Mr. Scott 25 capsules of heroin and you knew that you had sold him these capsules of heroin, were you then mindful of the fact that as a subsequent offender, under the narcotic laws, that you were for this one sale possibly facing
262 penalties of from ten to forty years in the penitentiary? A. Yes.

Q. You knew that, didn't you? A. Yes.

* * * * *

263 Q. You knew you could get ten to forty years on a sale?

A. Right.

Q. And all of these were separate sales? A. Yes.

Q. Well now, when Mr. Wurms first talked to you he reminded you of that, didn't he? A. He mentioned that fact.

Q. As a matter of fact, he told you that he was going to make you a proposition whereby you could help yourself, didn't he? A. No.

Q. He asked you to cooperate so that you could help yourself?
A. He asked me if I would, yes.

Q. For the purpose of helping yourself? A. Trying to help myself, yes.

Q. Because you knew about the ten to forty years for each violation, didn't you? A. Yes.

* * * * *

266 Q. When Mr. Wurms first spoke to you on January 17 about cooperating and trying to help yourself, by that did you understand him to mean that an effort would be made to get you as light a sentence as possible? A. Well, I asked him about that. I asked him what did he mean by help myself. And he said, well, any time that you help the Government you help yourself.

Q. What? A. Say he couldn't make me any promises.

Q. I know he didn't make any promises. A. I am telling you what he told me. He said, I can't make you any promises, but it is a known fact if you help the Government you help yourself.

Q. By getting a lighter sentence? A. That is as far as it went.

Q. That is what you hoped? A. That is what I hoped.

Q. That is what you understood? A. That is what I am hoping he meant.

Q. That is what you understood at that time for him to mean?
A. I am answering you now that is what I was hoping he meant.

* * * * *

267 Q. Now, when you went down to the Federal Narcotics Bureau, to see Mr. Wurms, who was present when you talked to him?

A. Mr. Thompson.

Q. And who else? A. That was all at the time.

* * * * *

Q. Did they tell you, sir, about these other offenses of which you had not at that time been advised about? A. Yes, I was told about it.

268 Q. You were told that they had not only this offense for which they had arrested you involving the December 14 transaction, but they also told you about the two cocaine sales and the half ounce heroin sale? A. Yes. They reminded me of it, that is, as you know, you made these other sales.

Q. And didn't they also remind you that you could constantly receive a sentence of from ten to forty years on each one of those transactions? A. They didn't place it that way. It wasn't worded that way.

Q. How was it worded? A. It was worded as a third offender, I am facing a possible ten to forty years.

Q. Ten to forty years for all those sales? A. That is the way it was worded to me.

* * * * *

269 Q. Now as a consequence of this meeting, or as a result of this meeting with Mr. Wurms and Mr. Thompson, did you agree to assist the Government? A. Yes.

Q. And was this for the purpose of helping yourself, sir? A. Yes.

Q. In these cases and these offenses that they had informed you about, these sales that they had informed you about? A. Yes, I was to cooperate with them.

270 Q. Now, at that time, sir, did you make any statement, written statement? A. At that first meeting, no.

Q. Did you agree to become employed by them? A. No, I wasn't to be employed.

Q. Were you to receive any money without being employed?

A. Was I to receive any?

Q. Yes, sir. A. That wasn't mentioned.

Q. That was not mentioned. A. No.

Q. Were you expecting that you were going to receive some money also, sir? A. No, not at that time.

Q. You weren't working then, were you? A. No, I wasn't.

Q. You had no legitimate source of income, did you?

A. No, I didn't.

Q. Did you later, sir, receive any money from the Government?

A. Yes, I did.

Q. But you weren't employed? A. No, I wasn't.

271 Q. You were not what is known as a special employee? A. No.

Q. When did you receive your first moneys from the Government for your cooperation? A. I don't recall the date.

Q. May I ask you, sir, whether or not you received moneys from the Government to pay Mr. Turney with? A. No, I haven't.

Q. How is that, sir? A. I have not.

Q. Did you use any of the money that the Government gave you to pay Mr. Turney with? A. No, I did not.

Q. When, if you can be specific, how long after you first talked to Mr. Wurms in his office did you receive your first money? A. It was sometime afterwards that -- I can't recall. I know that I was talking to Estelle Murphy one day and told her that -- I would mention the fact that I didn't have any money. So she asked me why didn't I ask them for some money.

Q. Like she was doing? A. I don't know whether she was or not. But she made this statement. And I said I would. And later on I did.

Q. Who did you ask? A. Mr. Wurms.

272 Q. And what did he say about your request? A. He said he would see what he can do. He would call me back.

* * * * *

275 Q. You made an agreement with Agent Wurms at this first
276 meeting to cooperate? True? A. Yes.

Q. In exchange for what, sir? A. Nothing. No particulars. I had hopes of helping myself.

Q. Now, you agreed to do something specific for them, didn't you, for Mr. Wurms? A. To let them know where I had acquired my narcotics.

* * * * *

283 Q. When was it that you eventually got around to asking them what it was they were going to do for you? A. I had already asked them that. He said he couldn't make any promises.

Q. Did they say that they would speak to somebody for you? A. They said they would talk to Mr. Smithson.

Q. Had you met Mr. Smithson up to that time? A. At that time I hadn't.

Q. When did you first meet Mr. Smithson? A. I can't recall the date.

Q. Was it before you went to the grand jury, sir? A. I think it was.

284 Q. Was it before you made this statement, sir? A. I am not sure whether it was before I made the statement or not.

Q. What did he tell you could be done for you if you cooperated? A. He didn't tell me anything in particular. The same thing that Mr. Wurms had told me, he repeated it.

Q. What was that? A. That if I helped the Government I can help myself.

* * * * *

Q. Did you feel, sir, that notwithstanding their hesitancy to make some promise to you, that they were going to do something definite for you? A. I had hopes that they would. But I had nothing
285 to go on. Nothing solid.

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286 Q. Now, all in all, how many times did you receive money from any of the agents of the Federal Narcotics Bureau to the present time?

* * * * *

287 Q. Give us an approximation then, Mr. Witness. A. Of how many times?

Q. Yes, sir.

Let me ask you this: Would you go once a week, sir? A. No.

Q. Once every other week? A. It is possible. Maybe one month I might go twice and one month I might not go at all. One month I might go once.

* * * * *

289 Q. How much would you estimate the Government has given you since the time that you agreed to cooperate with them down to the present time? A. Taking a guess, I would say a couple of hundred dollars.

* * * * *

291 Q. Before this trial began, Mr. Johnson, you pled guilty to one of these offenses in the indictment, didn't you? A. Yes.

* * * * *

292 Q. Which count of the indictment did you plead guilty to?
A. I think it was the third count.

Q. You think it was the third count? A. Yes.

Q. Was this by virtue of some prearrangement that had been made between you and Mr. Wurms or you and Mr. Smithson or your attorney?

MR. SMITHSON: I believe that probing on any relationship his attorney would have would be improper.

BY MR. SHORTER:

Q. You were advised to do this? A. By my attorney, yes.

293 Q. When was your attorney made aware of the fact that you intended to cooperate with the Government in this case? A. When I first obtained him.

Q. Did he feel that you needed him in view of your arrangement with the Government? A. I still wanted his advice.

* * * * *

295 Q. Now, had any discussion taken place between either you and Mr. Wurms or you and Mr. Smithson or you and anyone else, a person of authority, in respect of what was to happen to the charges against you if you cooperated? A. No, they didn't.

Q. What is that, sir? A. No, there was no talk of what would happen to the charges.

Q. But you were hopeful, weren't you? A. Yes, indeed.

* * * * *

303

CROSS EXAMINATION

BY MR. JOHNSON:

Q. Tell me, Mr. Johnson, there came a time when you made up your own mind, or there came to you from some source, the inspiration that you needed a lawyer. Answer me yes or no. Did Mr. Smithson suggest Mr. Turney to you? Yes or no. A. He didn't suggest him. He mentioned him.

304 Q. I see. What do you mean, he mentioned him? A. He asked me did I have a lawyer. I told him no.

Q. Then what happened? A. He asked me do I know of a good lawyer I would like to get. I said not, really. He asked me did I know Mr. Turney. I told him no. He said he was a good and honest lawyer.

Q. And that is how you got a lawyer? A. Yes, sir.

Q. You got him from Mr. Smithson? A. Yes.

* * * * *

308 Q. You have indicated to Her Honor and to the ladies and gentlemen of this jury that you got some two hundred dollars, approximately, from a narcotic agent. Was that a loan? A. No, it wasn't.

Q. You were not supposed to pay it back? A. No, I wasn't.

Q. Did you indicate to the agent what you wanted the money for? A. No; I just said I needed it.

Q. And on the basis of your need, it was given to you? A. Yes.

* * * * *

314 Q. When you did go to the narcotic agent to get money it was because you just needed it, isn't that right? A. That is true.

315 Q. Now when you got it, when you received it, did you receive it with the understanding in your own mind now, that it was for your services as a witness before the grand jury, your promise to cooperate and act as a witness, before the grand jury, and in this court proceeding? Is that true? A. That is correct.

Q. Did they ever refuse to give you any money? A. No.

Q. So every time you asked the narcotics agent for money he gave it to you on the basis of your need? A. Well, every time I have asked, I did receive some kind of money.

Q. Now, sir, did you ever discuss with your attorney your receiving money from a narcotic agent? A. No, I didn't.

* * * * *

329

CROSS-EXAMINATION
BY MR. MITCHELL:

Q. Mr. Witness, you stated that there were occasions when you obtained money from narcotics agent. And I will assume, sir, if this be correct, that that was Agent Wurms? A. That is correct.

Q. Did you obtain moneys from any other agent other than Agent Wurms? A. No, I didn't.

Q. Tell us, if you will then, sir, what was the amount, or the amounts that you got, if you recall, approximately, how much did you get each time? A. Well, several occasions -- one time I recall getting forty dollars. At one time thirty dollars. Several other occasions, twenty, ten.

Q. Were you employed during this period that you were receiving these Government moneys? A. Employed on some other job?

Q. Yes. A. No.

Q. What, sir, were you to do in return for those moneys? A. As far as I know, it was just for what I had already done; as far as agreeing to be a witness.

■ * * * *

401

Washington, D.C.
Thursday, Sept. 20, 1962.

* * * * *

422

HERMAN H. SCOTT

recalled as a witness by the Government, was examined and further testified as follows:

423

MR. SMITHSON: For the record, Your Honor, this witness has been previously sworn.

For the record, Your Honor, the Government, in addition to the conspiracy count, count one, will proffer this testimony on counts eight, nine, and ten of the indictment.

DIRECT EXAMINATION

BY MR. SMITHSON:

Q. You are Herman H. Scott, who has previously testified here; is that correct? A. That is correct, yes.

Q. I don't believe I asked you before, Mr. Scott, what is your employment now? A. I am presently employed as --

Q. Your voice is very low. There is an air conditioner here, sir. When you are in this center here it is almost like a wall. A. I am presently teaching school in Atlanta, Georgia, public school system.

Q. I would like to direct your attention, Mr. Scott, to the 22nd of January 1962, in the afternoon, about the middle of the afternoon, approximately four o'clock in the afternoon. Where were you, sir?

A. At 1246 Holbrooke Terrace, apartment number one, Washington, D.C.

424

Q. Is that in the northeast section of the city? A. That is correct, yes.

Q. And whose address is that, sir? A. That was the address of Estelle Murphy.

Q. The previous Estelle Murphy that you have mentioned? A. That is correct, yes.

Q. The same one, I should say.

Now, did there come a time that anyone came there while you

were there? A. Yes. At approximately 4:30 p.m. Valeria and Norman Pannell came to that apartment.

Q. You have described two people, Norman and Valeria Pannell. Do you see them in the courtroom, sir? A. Yes, I do.

Q. Where are they? Let's take Norman Pannell. Where is he? A. He is the gentleman seated at the far end of defense table. Has on a brown sweater.

MR. SMITHSON: May the record show the identification of the defendant Pannell by the witness?

THE COURT: Yes.

BY MR. SMITHSON:

Q. And the person Valeria Pannell. Do you see that person here? A. Yes. She is seated to Norman's right.

425 MR. SMITHSON: May the record likewise show the identification of the two defendants?

THE COURT: Yes.

BY MR. SMITHSON:

Q. Did both of these people come there together, sir? A. Yes, they did.

Q. And I want to ask you a certain question. Would you listen carefully, sir. I will ask you at this time, did you have a discussion or was there a discussion between you and the defendants Norman and Valeria Pannell and Estelle Murphy, or any combination of those people, relative to narcotics? Yes or no, please. A. Yes.

* * * * *

426 Q. Now specifically, sir, with regard to narcotics traffic, was there conversation between those there assembled which related to Charles Matthews or in the name of Gate or Gatemouth, Ellen Phelps, and Roachie?

* * * * *

433 Q. Now, sir, with regard to the conversation that I have asked
434 you about, I would like to ask you to relate to the Court and the ladies and gentlemen of the jury the conversation which took place at

that time relative to Charles Matthews and Ellen Phelps, particularly with regard to their connection if any with the Pannells on that day, or any activities with regard to delivery of narcotics.

MR. MITCHELL: If Your Honor please, I think I will, to protect myself, again make my objection to the question.

THE COURT: Very well.

MR. FIRST: I would like to make an objection on the same grounds.

THE COURT: Very well. The objection is overruled.

You may answer.

THE WITNESS: Well, at this time, Valeria and Norman Pannell started talking to special employee Estelle Murphy about the fact that Gatemouth had been to their apartment earlier in the day, at approximately twelve noon, and he had in his possession a half ounce of heroin, which he was supposed to deliver to Valeria, but as Valeria only had eighty dollars, he would not deliver the heroin because he wanted \$110.00 for the heroin.

THE COURT: He wanted what?

435 THE WITNESS: One hundred ten dollars for the heroin. So Valeria and Norman Pannell discussed the fact that they did not understand why he wouldn't deliver this heroin to them because they were only thirty dollars short, and in the past, they had been dealing with him regular, and that he knew that he could get his money from them.

At this time --

MR. FIRST: Your Honor, objection to what happened in the past. I ask that that be stricken from the record.

MR. SMITHSON: Your Honor, this is part of the res gestae. I cannot tell the witness what to say. I did limit my examination as Your Honor previously ruled.

THE COURT: The objection is overruled.

BY MR. SMITHSON:

Q. Go ahead, sir. A. At this time, I expressed the desire to purchase heroin myself, stating that I did not have connections, Norman

was short thirty dollars, and I would be glad to pay the \$110.00 for a half ounce of heroin, or either I would go in with them and pay whatever part he wanted me to.

At this time, Norman Pannell asked me to give him \$35.00. I gave him \$35.00 of previously listed Government funds; and Norman Pannell attempted to make a phone call. He made one phone call and he asked for Gate; and the person, whoever answered on the other end evidently told him that Gate wasn't in.

* * * * *

436 Q. Did Norman Pannell relate to you what was told to him on the phone? A. Yes.

* * * * *

A. Yes. Norman told me he had spoken with Gate's wife and that she had told him --

MR. MITCHELL: Objection to what Gate's wife had said.

MR. FIRST: Objection.

THE COURT: He is telling you what was said to him over the phone?

THE WITNESS: That is correct. This is Norman telling me.

THE COURT: You may proceed.

MR. MITCHELL: This is someone who is not a defendant. This is someone who is entirely a stranger to this entire situation.

437 THE COURT: The objection is overruled.

BY MR. SMITHSON:

Q. Go ahead. A. Norman informed me that this person, Gate's wife, had told him that he was not in.

He made another phone call; again asked to speak to Gate or Roachie; and at this time, he again told me that he was unable to reach Gate or Roachie, and that he would leave, he would get a taxi.

By this time, he left the house, the apartment, 1246 Holbrooke Terrace; and I continued to talk with Valeria and the special employe.

Valeria related to me the fact that Gate was doing her wrong in

that he would not let her get the narcotics for \$30.00 short because she had had a habit and he knew that she had a habit; and she went on to discuss Ellen Phelps, by telling me that Ellen Phelps was part of the organization and that she did supply the heroin or, rather, that she was the brains behind the organization, but she did not like to make deliveries.

And approximately -- we remained in this apartment approximately an hour and a half without hearing from Norman. At approximately 6:50 p.m., the telephone rang, and the special employe answered the
438 phone and gave the phone to me.

At the other end, Norman Pannell was speaking to me. He advised me that he had not been able to locate Gate or Roachie.

MR. MITCHELL: May it be noted in the record that we object to all of this?

THE COURT: Yes, certainly.

BY MR. SMITHSON:

Q. Will you go ahead with the conversation. What did he relate to you? A. He told me that he had not been able to locate Gate or Roachie, and, therefore, he did not have the heroin, but that he would continue to wait and he expected to reach one of them shortly.

He then asked to speak to Valeria.

I gave Valeria the telephone, and while Valeria was talking on the phone, she asked me how long should Norman wait. I told her to tell him to wait about another half hour, and if not to return to the apartment where we were waiting.

So she continued to talk with Norman and advised Norman of what I had said; and then she hung up the phone.

At approximately 7:20 p.m., Norman still did not arrive. So Valeria telephoned, made a telephone call; and when she finished talking
439 on the phone, she said to me that Roachie says that Norman is well. And that indicated to me --

* * * * *

Q. He said he was well? A. That is right.

Q. You have been buying narcotics, sir? A. That is correct.

Q. Does that phrase, he is well, have a meaning to you in the field of narcotics investigation? A. Yes, it does.

MR. FIRST: Objection, Your Honor.

THE COURT: The objection is overruled.

BY MR. SMITHSON:

Q. What is that meaning, sir? A. To me it means that you are no longer looking for narcotics, that you are in possession of narcotics. In other words, you have satisfied any desire you might have for narcotics.

Q. All right. Now, following this conversation wherein she told you that Roachie said Norman was well, what was said or done then, 440 sir? A. Well, as I said, I wished that Norman would return because I had this Government money out front, and not only that, I was -- I had been working all day, so I was interested in finding Norman and getting on with my other duties.

So Valeria offered to take me where she thought maybe Norman was. She went outside with me alone, with the special employe, and instructed me to drive to 701 24th Street, Northeast.

I drove to 701 24th Street, Northeast, and Valeria got out of the car, and the special employe remained inside with me. She went inside of the building, and in approximately five minutes later, she returned. She came back and told me that Norman was not there.

So we returned to 1246 Holbrooke Terrace, Apartment 1; and when we arrived there, Norman was inside the apartment.

Went into the bedroom of the apartment, Norman and special employe, Valeria and myself; and at this time, Norman provided me with forty-one capsules of a white powder. I then took Norman and Valeria and the special employe back to 701 24th Street, Northeast. At this time, Valeria and Norman got out of the automobile, and I returned the special employe to her residence, and then I proceeded to the office of the Bureau of Narcotics, where I secured the evidence in a lock- 441 sealed envelope in an overnight safe.

On the following morning, I weighed the evidence, in the presence of Narcotic Agent Wurms, and sealed it in an evidence envelope, and

turned it over to Agent Wurms for delivery to the United States Chemist.

THE COURT: Agent who?

THE WITNESS: Wurms, W-u-r-m-s.

BY MR. SMITHSON:

Q. At the time, sir, that you gave this money -- you used the phrase, "fronted" -- you mean you put the money out, is that what you mean? A. That is correct, without receiving any narcotics or any security whatsoever for the money.

Q. At the time you gave this money, sir, or at any time on that date or any other date, or when you received these narcotics, did you give a written order form to the people for the narcotics? A. No, I did not.

Q. Were there any Internal Revenue stamps, narcotic stamps on there, sir? A. No, there were no Internal Revenue stamps.

* * * * *

442 Q. You have used the name, sir, of Gate or Gatemouth. Was that person known to you at that time? A. By reputation only.

Q. By reputation only? A. Yes.

* * * * *

Q. Had you seen this person as of January 22, sir? A. No, I had not.

Q. All right. Did you ask any question of anyone present as to who this person Gate was? A. Yes. Well --

* * * * *

443 Q. Whom did you speak with, sir? A. Valeria Pannell.

Q. And did you receive an answer? A. Yes, I did.

Q. What was the answer? A. She advised me that he had a red Ford automobile, and that he was the father of her child, one of her children.

MR. FIRST: Objection, Your Honor. That has no relation to this case. I ask that that be stricken from the record.

MR. SMITHSON: Your Honor, the portion with regard to any paternity obviously is not related to this. It was not elicited. I asked

with regard to identity. I think the jury can be instructed that that is immaterial.

THE COURT: That remark will be stricken, with reference to the child. The jury will disregard it.

MR. SMITHSON: Thank you.

MR. FIRST: Your Honor, I would like to make a motion for a mistrial on that basis.

THE COURT: Motion for a mistrial is denied.

444

BY MR. SMITHSON:

Q. Now, sir, was there any further description, that is, with regard to the last name or residence if any given by Valeria Pannell as to this person Gate or Gatemouth? A. No, there was not.

Q. Now, you mentioned a person named Phelps. Did you make any inquiry of anyone on that particular date in this meeting as to who this Phelps was? A. No, I did not.

Q. You just secured that information? A. That is right.

Q. What about the person who used the name Roachie? Did you make any inquiry of that? A. Yes, I was advised that Roachie was --

Q. Did you make inquiry, sir? A. Yes, I did.

Q. Of whom did you make the inquiry? A. Of Valeria.

Q. Did you receive any advice in that regard? A. Yes, I did.

Q. What advice did you receive? A. I was instructed that Roachie was the son of Ellen Phelps.

445

Q. I see. Did you know or had you seen, as of January 22, 1962, Ellen Phelps or Roachie, as you received that name? A. No, I had not.

Q. I believe, sir, you have stated you gave no order form or saw no stamps on any alleged narcotics you received from Norman Pannell on this date? A. That is correct.

MR. SMITHSON: Your Honor, may I have this object marked for identification Government Exhibit 4-A.

THE COURT: You may.

MR. SMITHSON: And may this be marked for identification Government Exhibit 4-B, Your Honor.

THE COURT: Yes.

THE CLERK: Government's Exhibits 4-A and 4-B for identification marked.

(Whereupon envelope containing forty-one capsules was marked Government's Exhibit 4-A, for identification.)

(Whereupon lock-seal envelope was marked Government's Exhibit 4-B, for identification.)

BY MR. SMITHSON:

Q. I would like to show you at this time, Mr. Scott, Government Exhibit 4-A, for identification, the identification consisting of a small cream-colored tag which has the marking, 1-A. I am now removing that tag, and I show you the exhibit known as 4-A, and its contents.

446 I will ask you to examine it and state what it is.

* * * * *

THE WITNESS: This is the forty-one capsules that I received from Norman Pannell. I can identify this by a mark that I placed on this envelope.

Q. All right, sir. And those are the capsules you have heretofore described this morning? A. That is correct, yes.

Q. Now, sir, with these particular capsules, I believe you stated you did something? A. Yes. Well, I subjected them to a preliminary field test.

Q. Did you receive a color reaction, a positive color reaction? A. Yes, I did.

Q. Following this field test, sir, what did you do? A. I weighed and sealed them in an evidence envelope, and then I turned them over to Agent Wurms.

Q. All right, sir. I will show you Government Exhibit 4-B, for identification. I will ask you to examine it and state what it is. A. That is the evidence envelope in which I placed the forty-one capsules on the 23rd of January.

447 Q. And that envelope, sir, is it in the same condition as when

you gave it to Agent Wurms? A. No, it is not. It has been slitted, cut open, and that is the only difference, other than a few extra marks.

* * * * *

448 MR. SMITHSON: That is all I have with regard to that transaction.

MR. FIRST: Mr. Smithson, may I have the statement?

MR. SMITHSON: Surely.

CROSS EXAMINATION

BY MR. MITCHELL:

Q. Agent Scott -- Mr. Scott now, on this occasion, on January the 22nd, 1962, when you went to the premises 1246 Holbrooke Terrace, N.E., and at the apartment of Estelle Murphy, this was about 4:00 p.m., did you say? A. I said about four-thirty when the Defendants arrived.

Q. How did they happen to come there, do you know? A. No, I really couldn't tell you how they came there.

Q. Weren't you present when Estelle Murphy called them?

A. No, I was not.

Q. Didn't you learn from Estelle that she had called them? A. No.

449 I understood that one or both had been by Estelle Murphy's house earlier in the day.

Q. I see. Now, when you went there at or about four-thirty, sir, did you go there in the company of anyone else? A. No, I did not.

Q. Any agent at all that accompanied you or was near where you were? A. No.

Q. You had no contact then with any agent? A. Well, by -- no, no, I did not, no.

Q. Did you have knowledge that there was an agent observing?

A. To my knowledge, there was no agent observing.

Q. Now, you spoke of Estelle Murphy as a special employe.

A. I did, yes.

* * * * *

450 Q. Did you know about the reputation of Estelle Murphy?

THE COURT: Of what?

BY MR. MITCHELL:

Q. Of Estelle Murphy. A. I knew that she was an informer.

Q. Did you know she was an addict? A. No, I did not know it.

Q. Didn't you also learn in connection with her reputation that she was an addict, that she dealt in narcotics herself and that she was known as a stool pigeon? Did you know that? A. No, I did not know that.

Q. Did you later learn that? A. No. I know she is an informer. That is the street lingo for stool pigeon.

Q. You did then learn that she did have that reputation? A. Sure, I have heard of that, yes.

Q. Now, how long, Mr. Scott, did you say that you had been in this employment as an agent? A. At that time?

Q. Yes. A. Oh, I imagine about eighteen months.

451 Q. In the course of your experience, you had learned to determine to your satisfaction, from observation of an individual, whether they were under the influence of narcotics, hadn't you? A. To some degree, yes.

Q. Well now, with respect to Estelle Murphy, were you aware she was using narcotics? A. No, I was not.

Q. And at no time did you ever see her under the influence of narcotics? A. I could not say that she was under the influence, but I never thought she was.

Q. You never had an impression in that regard? A. That is correct, yes.

Q. Now, at the time that you went to these premises, sir, did you have any type of recording device on your person, such as a Minifon, or anything that would record these conversations that you have recited? A. No, I did not.

Q. So then what you have told the Court and the jury, sir, is purely predicated or based upon your recollection of what took place and what was said on January 22, 1962, is that correct, sir? A. That is correct, yes.

452

BY MR. FIRST:

Q. Mr. Scott, you told us earlier that you were under the supervision of only one agent, Agent Morrison, is that correct? A. That is correct, yes, sir.

Q. But you were working with other agents? A. That is correct, yes.

Q. Such as Agent Wurms? A. Correct.

Q. Before January 22, 1962, had you ever met the Pannells before? A. No, I had not.

Q. They were strangers to you, isn't that right? A. That is correct, yes.

Q. When they came in that day, that was your first occasion in meeting them? A. That is correct, yes.

Q. You stated earlier that you did fifty per cent of your work with Estelle Murphy. A. Correct, fifty per cent of my cases in the Washington area.

Q. And didn't you learn that the Pannells were in the apartment by invitation of Mrs. Murphy that day? A. No, as I aforestated --

453

Q. Just answer, yes, or , no. A. No.

MR. SMITHSON: I believe the witness is entitled to make a complete answer, Your Honor.

THE COURT: He has answered, no.

THE WITNESS: No. That is sufficient, yes.

BY MR. FIRST:

Q. Did you represent yourself, while in the apartment, to be a friend of Mrs. Murphy? A. Yes.

Q. A boyfriend? A. I didn't represent myself as a boyfriend. I did not.

Q. She did? A. She did.

Q. And you made no objection? A. Correct.

Q. And that was part of the plan, is that not true? Hadn't you discussed this with her before? A. No, not this particular transaction, no.

Q. This just came up all of a sudden? A. Well, when I am working -- when I was working as a narcotic agent, I was always interested in making cases. That is what I got paid for.

454 Q. She informed you that the Pannells were coming over that day? A. Well, she didn't inform me that they were coming over. They arrived while I was there.

Q. There was no planned arrangement for you to buy anything from the Pannells? A. No.

Q. Isn't it true, sir, that you initiated this conversation about narcotics this day at Mrs. Murphy's? A. No.

Q. The talk was flowing all around? A. Well, it is customary -- if people come in and -- I imagine Miss Murphy started the conversation. I don't know, because I don't imagine --

Q. Just a minute. Who else was in the apartment besides Mrs. Murphy? You were there, Mrs. Murphy was there, Mr. and Mrs. Pannell. A. And that's it.

Q. Didn't there come a time when Mrs. Murphy's daughter was in the apartment? A. That is correct, yes.

Q. Did she hear some of this conversation? A. No.

455 Q. Could you describe this apartment for us? A. Yes. Well, a living room, then you hit a dining room, and a bedroom to your left of that, and a kitchen, and there is something like a rec room, terrace, or something, on the rear of the apartment.

Q. When you had this conversation -- do you know her daughter's name? A. Yes, I think so.

Q. What is her name? A. Laureen Murphy, I think.

Q. Did Laureen hear this conversation? A. Well, we made every effort for her not to hear it. I don't know whether she heard it or not, but I don't think she did.

Q. You are not sure? A. No, I can't be sure of that, no.

Q. She could have heard it? A. It is possible, yes.

Q. It is not too big an apartment.

Now, you had no definite plans to buy anything that day, did you,

in this apartment? A. No, not in that apartment, no.

Q. And as you stated, these two Defendants were strangers to you? A. Correct.

456 Q. Did Estelle Murphy introduce you as her chauffeur, in that you drove her around when she was shoplifting? A. I don't recall.

Q. Was there any mention of that? A. I remember something about shoplifting, yes.

Q. She did state that. She had to give you some kind of disguise or cover before these people. A. That is right. As I said before, she gave me the disguise as being her boyfriend, and there was some discussion about shoplifting in that --

Q. She kind of reenforced --

MR. SMITHSON: The witness hasn't finished.

MR. FIRST: Excuse me.

THE WITNESS: -- inasmuch as Valeria had expressed a desire to go shoplifting with Mrs. Murphy.

BY MR. FIRST:

Q. Did you also represent yourself as a seller of narcotics? A. Yes.

Q. Did you represent yourself as a user of narcotics? A. No, I did not.

Q. Did you make it seem that you were sick that day? A. No.

Q. Or that you were in need of narcotics? A. No.

457 Q. You appeared perfectly normal, as best you can interpret? A. As best as I can determine, yes.

Q. Did Estelle Murphy express a desire for narcotics for her own personal use that day? A. No, not to my knowledge, no.

Q. Weren't the Pannells reluctant to discuss -- at least reluctant to discuss the subject of narcotics in your presence? A. Well, at first, upon coming into the apartment, they were, but having been assured that I was all right by Mrs. Murphy, the conversation -- I joined in the conversation. In the beginning, I was slow about joining the conversation because I wasn't a part of the group, but after a while, I was able to get in the conversation.

Q. In fact, if she didn't give you this aura of being O.K., as you say, the subject probably never would have come up, isn't that true?

A. Correct.

Q. Do you know whether or not Estelle Murphy had any drugs in her apartment? A. No, I don't know whether she had any or not. There were none in my presence, none displayed.

Q. There could have been some in the apartment? A. Sure.

458 MR. SMITHSON: That is speculation. I object to speculation, if it please the Court.

MR. FIRST: Your Honor, in answer to his objection, Estelle Murphy is known to have had --

THE COURT: That doesn't mean that he knows what she has in her apartment. He has told you --

MR. FIRST: As far as he knows, she did not have any. I asked if she might have. He has worked with this lady. He knows her activities. That is why I asked the question.

I will withdraw the question.

BY MR. FIRST:

Q. Before this transaction, did you search the apartment for narcotics? A. No, I did not.

Q. It is possible they came from within the apartment; isn't that a possibility?

MR. FIRST: I withdraw the question.

Would Your Honor indulge me one moment, please?

THE COURT: Certainly.

BY MR. FIRST:

Q. Mr. Scott, at no time did you see Valeria Pannell touch any narcotics, isn't that true? A. That is correct.

459 Q. Now, you made this offer to give \$30.00 to Norman Pannell to facilitate a sale, isn't that correct? A. That is correct, yes.

Q. And to insure a sale? A. Well, that was -- as I said before, I was interested in buying the whole half ounce. I would have paid \$110.00, but he only wanted \$35.00.

Q. Could you tell us how long you were in the apartment that day, total time? A. I would say approximately an hour and fifty minutes.

Q. Total time in the apartment? A. No, approximately two hours and fifty minutes in the apartment.

Q. Two hours and fifty minutes? A. Approximately.

Q. Did you at any time make any original notes of this transaction on this day? A. I think on the date of the 23rd, I typed up a memo, which I think you have at your desk. Those are the only notes I have of the transaction.

THE COURT: Keep your voice up. please.

BY MR. FIRST:

Q. Did you type a memo up from notes? A. No.

460 Q. You typed it up from memory? A. That is correct, yes.

Q. These forty-one capsules, did Estelle Murphy touch them?
A. No, she did not.

Q. Was that cellophane package tested for fingerprints? A. No, it was not.

MR. FIRST: I have no further questions.

THE COURT: Do any of the other counsel desire to examine the witness?

MR. SHORTER: Yes, Your Honor.

BY MR. SHORTER:

Q. How long had you been in Estelle Murphy's apartment before Mr. and Mrs. Pannell arrived? A. At the most, one-half hour.

Q. Now, was it intimated to you by Mrs. Murphy that the Pannells were expected? A. No. As I aforestated --

Q. I didn't ask you what you aforestated, Mr. Witness. A. No.

Q. Had you asked Mr. Murphy to set the Pannells up for you? A. No, I had not.

Q. Well now, had Mrs. Murphy ever mentioned the names of the Pannells to you before the time that you were in her apartment on this

461 case? A. No.

Q. Now, what you are telling us is, so far as you are concerned, it was wholly accidental and coincidental that the Pannells came by on this particular afternoon? A. So far as I am concerned, yes.

Q. And their names had not been mentioned by either you or Mrs. Murphy prior to the time that they got there? A. Correct.

Q. Now, how long had they been in the apartment with you and Mrs. Murphy before the time that Mrs. Pannell, according to you, began to relate something that took place earlier that day? A. Oh, approximately ten, fifteen minutes.

Q. Now, I think you told us that as to you the Pannells were complete strangers? A. That is correct.

Q. They were strangers to you and you were a stranger to them? A. In so far as I know, yes.

Q. Now, it is a fact, is it not, sir, as I believe you have stated in answer to Mr. First's question, that the conversation relating to narcotics was started by Mrs. Murphy? A. I think that is correct, yes.

462 Q. Now, it is correct, is it not, sir, that your identity was known to Mrs. Murphy? A. Correct.

Q. And that you and she were working together, in concert with each other? A. That is correct.

Q. Now, there came a time that Mr. Pannell left the premises? A. Correct.

Q. You aren't in position to tell us where he went, are you, sir? A. No, I am not.

Q. You are not in position to tell us who he saw, what he did while he was out of your presence? A. No, I could not attest his activities while he was away from me.

Q. Well now, after Mr. Pannell had left, who began the conversation with Mrs. Pannell, as you have described it to us? A. Well, it was a round table discussion, more or less, everybody was just talking.

Q. Did you start the conversation? A. At times, yes.

Q. You were interested in trying to pick Mrs. Pannell for information, were you not? A. I was interested in getting all the information I could about any activity regarding narcotics.

Q. And you were, consequently, attempting to pick her for information? A. Not pick -- question, discuss, compare notes.

Q. But you kept the conversation in the flow of the narcotics traffic, did you not? A. Correct.

Q. And Mrs. Murphy, being your agent and your assistant in respect of your activities, assisted you in trying to keep this conversation going the way that you wanted it to go? A. Correct.

Q. Now, Mr. Witness, we have had some experience with your ability to remember who first mentioned names of persons.

Now, who first mentioned the name of Gate or Gatemouth Matthews? A. Valeria Pannell.

Q. And who first mentioned the names of the other defendants here on trial, except the Pannells? A. Murphy.

Q. Mrs. Murphy did? A. Correct.

Q. And did she do this by way of putting question to either Mr. Pannell or Mrs. Pannell? A. That is correct, yes.

464 Q. And what part did you play in this? A. Well, in the initial stage, I played the part of a listener.

Q. Just a listener? A. That is correct.

Q. You would have us believe, sir, that these people, the Pannells, conducted this conversation that you described to us in your presence --

MR. SMITHSON: Object to the form of the question. It is not what Mr. Shorter would choose to believe. It is what the jury will find from the evidence.

MR. SHORTER: I am asking if he would have us believe.

MR. SMITHSON: I object to the form of the question, Your Honor.

THE COURT: The objection is sustained to the form of the question.

MR. SHORTER: All right, Your Honor.

BY MR. SHORTER:

Q. Mr. Mitchell asked you about a Minifon or Minifons. A. Recording devices, yes.

Q. What experience have you had with those? A. Well, in this case, none.

465 Q. Have you had any in any other case? A. Yes.

Q. And was this prior to January 22, 1962? A. Yes.

Q. These are miniature recording devices, are they not, sir? They can be worn by a person in an undetected fashion and utilized to pick up conversation or to record conversation? A. Well, the ones I am acquainted with pick up conversation but not record conversation.

Q. At your office they do have the type of devices by which you can record conversations, these miniature recording devices? A. Not the miniature, no.

* * * * *

Q. Mr. Witness, how was Mrs. Murphy being compensated for the work that she was doing for you, sir? A. I am not able to advise you how she was being compensated, because I don't know.

Q. Did you ever give her any money? A. Yes, I gave her money.

466 Q. I mean for her personal use? A. Yes, for her personal use.

Q. At whose direction, sir? A. Agent Wurms'.

Q. And had the request been sent through you from Mrs. to Agent Wurms to obtain some money for her? A. On various occasions, yes.

* * * * *

468 Q. Well now, wouldn't you say that on eighty per cent of the occasions that you were working as a narcotics agent in the District of Columbia, you had some contact with Mrs. Murphy, either by telephone or in person? A. No, I wouldn't say that.

Q. What is your estimate of the percentage? A. Approximately forty per cent of my time.

Q. All right. On all the occasions that you were in contact with her, it was as a special employe? A. Correct.

Q. Now, during the six-month period, sir, that is up to January of 1962, how many times did you give her money? A. I delivered money to her approximately ten times during my whole association with her.

469 Q. In what amounts? A. From -- smallest, I imagine, was \$20.00 -- I imagine.

Q. And what was the highest amount? A. About a hundred dollars at the most.

* * * * *

Q. You were aware that she was getting money from the Bureau other than the money that you were bringing to her, isn't that correct, sir? A. No, I wasn't aware of it.

Q. Did you get a voucher from her or a receipt from her? A. Yes, I always got a receipt for the money I gave her.

* * * *

471 Q. Let me ask you this: When you gave her that hundred dollars, was this a hundred she had asked for or had somebody determined she was entitled or due a hundred dollars? A. On that particular day, I received a telephone call from Agent Wurms at my residence to give, if I had the money to give it to Estelle Murphy, one hundred dollars, and he would reimburse me the next time he saw me.

* * * *

REDIRECT EXAMINATION

BY MR. SMITHSON:

* * * *

473 Q. Did you ask Norman Pannell or did he tell you where he obtained these narcotics? A. He told me; I didn't ask him.

Q. Where did he tell you? A. He told me that he had received them from Roachie.

MR. SMITHSON: I haven't anything else.

THE COURT: Then you may step down.

(Witness temporarily excused.)

* * * *

552

Washington, D.C.
Friday, Sept. 21, 1962

* * * *

565

SAMUEL J. REED

was recalled as a witness by the Government and, having been duly sworn previously, was examined and testified further as follows:

MR. SMITHSON: I believe this witness has been previously sworn and testified, Your Honor.

DIRECT EXAMINATION

BY MR. SMITHSON:

Q. You are Samuel J. Reed? A. Yes, sir, I am.

Q. You have been previously sworn and testified in this cause?

A. Yes, sir, I have been.

Q. I would like to direct your attention, Mr. Reed, to February 15th of 1962, approximately 3:00 or 3:30 in the afternoon. I will ask you if you were with anyone at that time? A. Yes, sir; I was with narcotics Agent Andrew J. Heneghan.

566 Q. Tell me, sir, were you in the office, or were you at any particular area of the city? A. Agent Heneghan and I were in the vicinity of 1724 Potomac Avenue, Southeast, Washington, D.C.

Q. I will ask you if you had occasion to observe a vehicle at that place? A. Yes, sir. Parked in front of those premises was a 1961 red convertible Ford, bearing District of Columbia registration WT-947.

* * * * *

567 Q. Did you see anyone get in it? A. Yes, sir. I saw Charles Matthews leave 1724 Potomac, Southeast, and enter this car.

Q. Did he drive the vehicle anywhere? A. Yes, sir. Agent Heneghan and I followed him to the 4800 block of C Street, Southeast, Washington, D.C.

Q. Did he keep going, or did he park? A. He parked there.

* * * * *

568 Q. Now, sir, when you saw him next, what was he doing? A. I saw him leaving the apartment house at 4800 C Street, walk down to his car and enter. He remained seated in the car for a few minutes after which he drove away.

Q. Where did he go, do you know? A. We followed him to the 4600 block of Hillside Road, Southeast, where he parked in front of 4650 Hillside Road, Southeast.

Q. Do you know who lives in that area? A. Yes, sir, I do.

Q. Who? A. Charles Matthews.

Q. His home is in that area? A. Yes, sir.

Q. Did he leave the car? A. Yes, sir. He left the car and walked towards his apartment building.

Q. Did you see him again? A. Yes, sir. We maintained surveillance on the car and we saw him emerge from his apartment building, and walk to the car and enter.

Q. Did he go anywhere? A. Yes, sir. We followed him again to the 4800 block of C Street, Southeast, Washington, D.C.

569 Q. And what did he do there? A. Again, we went around the block to get a better observation point, and we didn't see what apartment house he entered at that time. The car was parked in front of 4800 C, Southeast. Later he came out of the apartment building at 4800 C, Southeast, and entered his car.

Q. Did he go anywhere? A. Yes, sir. We followed him to the 700 block of Twenty-Fourth Street, Northeast, Washington, D.C.

Q. Did he stop there? A. We gave him a few minutes, because this area, Twenty-Fourth Street, Northeast, is a one-way street, so we gave him enough time, and as we passed through the 700 block Twenty-Fourth Street, Northeast, we observed his car parked in front of 701 Twenty-Fourth Street, Northeast.

Q. What did you do then? A. Agent Heneghan and I then drove to Twenty-Third Street, Northeast, and took up an observation point where we could see any cars leaving from the 700 block of Twenty-Fourth Street, Northeast.

Q. Tell me, sir, who lives at 701 Twenty-Fourth Street, Northeast, if you know?

* * * * *

570 A. It's a residence, at that time it was the residence of Valeria Pannell.

Q. Tell me, sir, did you see the defendant Matthews in that car again? A. Later we saw the car emerge from that area. Charles Matthews was driving and sitting beside him on the passenger side was Valeria Pannell.

Q. And this Valeria Pannell is present in the courtroom?

A. Yes, sir, she is.

Q. Where? A. She is sitting at the end of the defendants' counsel table.

* * * * *

571

CROSS EXAMINATION

BY MR. SHORTER:

* * * * *

572

Q. What did you see Mr. Matthews and Mrs. Pannell do at the Benco Shopping Center? A. The only thing I saw was the car being stopped and Mrs. Pannell getting out of the car and walked towards the shopping center.

Q. Did you see her leave the shopping center? A. No, sir. We didn't place any observations on her.

* * * * *

573

Q. Can you tell us, sir, how long Mrs. Pannell stayed in that area, sir, before she returned to the car? A. No, sir; I never did see her return to the car.

* * * * *

845

Washington, D.C.
Tuesday,
September 25, 1962

* * * * *

929

(AT THE BENCH:)

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931

MR. FIRST: Can you tell me when Estelle Murphy started work on this case?

MR. SMITHSON: This case, she worked only the one day, sir, which was the 22nd of January, I think it was. She received \$9.00.

MR. FIRST: Could you tell me who she got it from, anyone in particular? Does it say, is it initialed?

MR. SMITHSON: It was approved, sir, by Agent Wurms, -- not approved; I should say paid by Agent Wurms.

* * * * *

942

THE COURT: Where is this part that you think that you got this \$9 from? Here is one \$9 up there but that isn't it.

943

(indicating on card)

MR. SMITHSON: No, Your Honor, it came in this payment right here, Your Honor, in this one which covers a period of time, as you will see, 1-1 to 1-31. It's a total payment. The voucher itself, I have seen, specifies the date, and it names this particular case. I will tell you frankly, it names other cases and other material I am not free to disclose.

MR. FIRST: Well, could I ask you a question about the card? What did you just mean by 1-1 to 1-30? That is through the month of January?

MR. SMITHSON: That's correct.

MR. FIRST: Yet you link the \$9 to -- directly to January 22, 1962?

MR. SMITHSON: That's right, sir, by the voucher submitted for reimbursement by the agent wherein he specifies January 22nd. He specifies a number of other dates and links these activities of Estelle Murphy to different cases than this one.

MR. FIRST: Your Honor, all I can say is, I am having a hard time determining the significance of the information on that card as it relates to my people.

* * * * *

945

SAMUEL J. REED

was called as a witness by the Government and, having been previously duly sworn by the deputy clerk, again took the stand and testified as follows:

946

DIRECT EXAMINATION

BY MR. SMITHSON:

* * * * *

947

MR. SMITHSON: Your Honor, I think we are at about that position where possibly Your Honor would care to have an out-of-court hearing.

948

THE COURT: Members of the jury, there is something here that the Court and the attorneys need to do out of the presence of the jury, and so I am going to excuse you for awhile. I don't know just how long it will be but perhaps there is some reading matter that you could send downstairs for, I mean and get some newspapers, I believe. There are some newspapers, I believe, down there. Maybe you could bring a few magazines from the jurors' lounge.

DEPUTY MARSHAL: Yes, Your Honor.

(Thereupon the jury was returned to the jury room.)

* * * * *

955 Q. I show you Government Exhibit 15 for identification and ask
 you to examine it and state what it is? A. This is a two-and-one-half-
 page statement which was taken by Agent Heneghan and myself,
 reduced in writing by Agent Heneghan. This is a statement which

956 Doris read, which she made the necessary corrections. Then
 she initialed the bottom of each page and at the end of the statement,
 which is on the third page, she signed it, "Doris Louise Gardiner,"
 and then "3-8-62" and then that the statement was prepared by
 Andrew J. Heneghan and witnessed by me, Samuel J. Reed.

* * * * *

1175 Washington, D.C.
 Thursday
 September 27, 1962

* * * * *

1251 THE COURT: No, if you have any request I would like to be
 made now because I intend to have the jury commence again this
 afternoon.

MR. SHORTER: All right, Your Honor.

Your Honor, I would move that any reference to the other
 defendants, that is all defendants except Mrs. Gardiner, in that
 statement be excised, be deleted and not be given to this jury; that
 no portion of that statement relating to any other defendant should
 go to the jury.

* * * * *

1260 MR. FIRST: Your Honor, I wish to join in this objection
 and go all the way with Mr. Shorter.

* * * * *

1266 MR. FIRST: Your Honor, I wish to make the same objection, in conformance with Mr. Shorter's argument, that the admission of that statement as to the other defendants would be objectionable from my standpoint.

* * * * *

1283 MR. SMITHSON: The Government offers Exhibit 15, Your Honor.

MR. MITCHELL: May we approach the bench?

THE COURT: Yes.

(AT THE BENCH:)

MR. MITCHELL: If Your Honor please, in the light of what I think I have a right to fairly anticipate, Your Honor's admission of this statement, subject, however, to the deletions that Your Honor has directed the District Attorney to make, I then, and now, on behalf of the defendants whom I represent, move Your Honor to grant a severance as to them, and, in the alternative, if Your Honor please, we move for a mistrial.

MR. FIRST: Your Honor, I also would like to make a motion for severance of my clients. This is the first time I have asked for
 1284 a severance. Their connection with this case hangs on the testimony of one witness, Herman Scott, the agent in this lengthy trial, and all the testimony, whatever it may be, is highly prejudicial to them, and I anticipated that and that is why I waited until this moment to ask for a severance of their case.

I would like Your Honor to consider it.

* * * * *

1285 THE COURT: The motions are denied.

MR. JOHNSON: I will join in the motion with you for a severance.

MR. FIRST: I also join in the motion.

MR. SHORTER: When I say severance I mean I move that this Court sever Mr. Matthews from the defendant Doris Gardiner because of the contents of that statement.

I think that the statement is admissible against Doris Gardiner but Doris Gardiner is not being tried separately; she is being tried with Mr. Matthews, and to admit what Doris Gardiner said against Mr. Matthews, as set forth in that statement, absolutely and completely prevents him from receiving a fair trial.

I would ask the Court to sever Mr. Matthews, along with the rest of the defendants, from Mrs. Gardiner.

THE COURT: The motions are denied.

* * * * *

1287 THE COURT: Yes.

Members of the Jury: You will recall that the testimony this afternoon has been about a statement which the witness now on the stand has said was given by the defendant, Doris Gardiner, after her arrest.

You are to consider the statement made by Doris Gardiner after her arrest solely in connection with your determination of the guilt or innocence of the defendant, Doris Gardiner.

The statement is not to be considered as proof in connection with the guilt or innocence of any of the other defendants. The reason for this distinction is this: an admission by the defendant, Doris Gardiner, after her arrest, of participation in alleged crime, may be considered by the jury as evidence against her, together with other evidence, because it is, as the law describes it, an admission against interest which a person ordinarily would not make.

1288 However, if such defendant, after her arrest, implicates other defendants in such an admission, it is not evidence against those defendants, because as to them it is nothing more than hearsay evidence.

In short, what I have tried to say to you is that this statement, regardless of what it says, is admissible only as to the defendant, Doris Gardiner, and you are to keep that in mind at all times.

MR. SMITHSON: Shall I read it now?

THE COURT: Yes, if you wish.

MR. SMITHSON: "Statement of Doris Louise Gardiner, Made to Narcotic Agents Samuel J. Reed and Andrew J. Heneghan in the Bureau of Narcotics Office, Internal Revenue Building, on March 8th, 1962.

"I began working at Gordon's Supermarket, 1818 Benning Road, N. E. on December 27, 1961 and after I had been working there only a short time, I was visited by Matthews who inquired how I was doing. I told Matthews that I needed money and he gave me \$50.00 on this occasion and told me that he would let me have some heroin on consignment to get me started in the drug traffic for the purpose of making some money.

"It was about January 8 or 9, 1962 that Matthews gave me a half ounce of heroin on consignment. I might say here that I usually test all drugs that Matthews gave me, and I can tell by the reaction if it is heroin or not. Well in all of my dealings with

1289 Matthews I have never known him to give me any heroin that did not test out all right.

"Not long after this, I don't remember the date, but it was the first time I met 'Ricky', I gave Ricky four capsules of heroin from each of two half ounces of heroin I had received from Matthews on the same date. One of the half ounce packages had heroin that was a brownish color and Matthews had told me to 'Try it and see what it is like'. It was at the time that Matthews gave me these two half ounce packages, that I gave Matthews \$125.00 to pay for the initial half ounce of heroin that I had received from Matthews on consignment. My recollection is that these first two deliveries were made to me by Matthews at the Diner, located at 19th Street and Benning Road, Northeast.

"During the next two weeks I would get a half ounce of heroin at a time from Matthews, and this was usually three times a week. I would get in touch with Matthews between 8:30 and 9:00 A.M. in the morning. I would call him at LU 1-8460, which is the telephone number at his home. If I could not get Matthews at this number I would then call him at Ellen Phelps telephone number which is LI 3-4168. These deliveries were made either by Matthews or Phelps and the delivery would take place at the

1290 Diner, at the store where I worked or at 19th and Maryland Ave., Northeast.

"I next sold heroin to Ricky at the supermarket and on this occasion I sold him an ounce of heroin. I received delivery of the heroin at the store on this occasion because as I remember it was raining and I did not go outside for lunch. I don't remember who delivered the heroin to me; however it was either Matthews or Phelps. My best recollection is that it was Phelps who delivered this heroin to me and picked up the money for it later the same day. This heroin was wrapped in newspaper and I gave Ricky his heroin in the same wrapper.

"The next dealing I had with Ricky occurred at night. I had told Ricky to telephone me at my house at 8:30 P.M. that night.

However, as I approached my house that night in a car being operated by Harold Mitchell I saw a suspicious car near my house that I thought contained two police officers. I directed Harold to a telephone and I called home and told my people to tell Ricky to come to my house. Later, I called my house and got Ricky on the telephone and I told him to leave my house and walk east on Upshur Street, Northwest towards Georgia Avenue and that I would pick him up with the car. I did pick up Ricky with the car as he crossed

1291 14th Street. Ricky told me he wanted an ounce of heroin and I asked him for the money. I had misunderstood Ricky earlier in the day when he placed his order and I was under the impression that he wanted only a half ounce of heroin, so I had only ordered a half ounce for myself and a half ounce for Ricky. I told Ricky of our misunderstanding and I returned \$100.00 to him telling him that I had ordered a half ounce for him and that would cost \$125.00.

"We got lost trying to find our way to the Shrimp Boat and arrived there too late to meet the 'connection'. I placed a telephone call to Phelps and told her that I was at the Shrimp Boat and was waiting for the heroin. Phelps told me that the 'man' had been there and left; however Phelps said that she would send him back. I made this call from the Service Station at Central and Benning Road, Northeast. I returned to the vicinity of the Shrimp Boat and waited for the connection. After a while Roland Henry, alias 'Roachie' arrived at the Shrimp Boat and I entered a red convertible, with a 'continental kit' on the rear bumper, and we drove around the block in which the service station is located where I made my call to Phelps. During this ride Roland Henry gave me the ounce of heroin and I gave him the \$225.00. This heroin was contained in

1292 two glassine envelopes and was not otherwise wrapped. After Roland Henry dropped me off at the Shrimp Boat I walked back to join Ricky and Mitchell who were parked two and a half blocks away. I gave Ricky one of the envelopes containing a half

ounce of heroin. I later dropped Ricky off at 7th and L Streets, Northwest and I went home with Mitchell.

"My next dealing with Ricky was at the supermarket where I worked. I remember this occasion because Ellen Phelps had delivered the heroin to me only a few minutes before Ricky arrived and I remember Ricky asking me how long it had been since the connection left. I don't remember my answer to him, but I did not say anything about the connection just leaving.

"My next dealing with Ricky was also at the supermarket where I work. I don't remember whether Matthews called me, or I called Matthews. Matthews did come to the store later and told me there was a suspicious car parked on Benning Road and he asked me to come out to his car. I left the store about 1:00 P.M. and walked to Matthews car which was parked on Benning Road, near 18th Street, Northeast, and as I entered I noticed Phelps in the car. This was the Cadillac. Matthews was driving and he made a 'you' turn on Benning Road and drove to 19th Street where he dropped me off. During the

1293 ride Ellen gave me an ounce of heroin in two glassine envelopes, wrapped in brown paper, and I gave Phelps \$225.00. This was the last time I had any dealings with Matthews, Phelps or Roland Henry.

"I have known Charles Matthews for over 20 years. I have known Ellen Mary Phelps for about 17 or 18 years. I have only met Roland Henry on two occasions, the Roland Henry I have mentioned in this statement, and also as the man who delivered an ounce of heroin to me at the Shrimp Boat on the occasion I have previously mentioned.

"I have carefully read this statement consisting of three pages and it is a true statement of my narcotic transactions with Matthews, Phelps and Henry, and accordingly I have placed my signature on the third page and have initialed the other two pages as well as any corrections thereon.

"This statement is made voluntarily without any promises of reward, without any threats or other inducements by Narcotic Agents."

Signed "Doris Louise Gardiner 3/8/62"
over the typed name "Doris Louise Gardiner (date)"

"Statement Prepared by:

Andrew J. Heneghan 3/8/62" over the name Andrew J.

1294 Heneghan (date) Narcotic Agent"

"Witness:

"Samuel J. Reed 3/8/62" over the typed signature

"Samuel J. Reed, Narcotic Agent (date)"

* (AT THE BENCH): *

1295 MR. MITCHELL: May we again, if Your Honor please,
just out of caution, renew our several motions?

THE COURT: Yes

MR. FIRST: I will join in that.

THE COURT: Yes. Very well.

(IN OPEN COURT:)

THE COURT: Members of the jury, I again caution you that the statement which you heard was made by the one defendant, Doris Gardiner, and is to be considered evidence as to Doris Gardiner alone, and it is not to be considered as evidence against the other defendants.

Now, Mr. Smithson.

* * * *

1299 MR. SMITHSON: That is the Government's case, in chief,
Your Honor.

* * * *

1346 Washington, D. C.
Monday
October 1, 1962

* * * *

1349 THE COURT: All of the defendants, I believe, are present?

MR. MITCHELL: Yes, ma'am.

THE COURT: And all counsel are present.

At the end of the last session some motions were made.

(There was a pause.)

THE COURT: These motions were for judgments of acquittal. I have concluded not to grant the motions; that is, to deny the motions at this time as to all defendants.

* * * * *

1361 MR. FIRST: Your Honor, I have several motions to make.

I would like to make it clear that I have moved for acquittal for both of the Pannells, Norman Pannell and Valeria Pannell, not only as to the conspiracy but all counts and theories of the Government's case.

I also make a motion for acquittal on the basis that entrapment has been established as to these defendants as a matter of law by the testimony that is in the record with respect to Scott.

THE COURT: Mr. First, I want to set you straight on this.

1362 If you are claiming entrapment it is your burden to go forward with the evidence of the alleged entrapment, and when you have done that then the Government - -

MR. FIRST: Your Honor, there are cases that hold entrapment can be made out as a matter of law from the evidence put on by the Government's case. I am doing that now.

The fact that Scott has testified --

THE COURT: (Interposing) I don't think that has been done.

MR. FIRST: That is my motion.

THE COURT: I want to make it clear that it is up to you to put on something with respect to the entrapment.

But you are relying on what has been put on in the Government's case?

MR. FIRST: That is right, Your Honor. That is my motion,

as a matter of law.

THE COURT: I will deny your motion.

* * * * *

1363 MR. FIRST: Your Honor, I would also like to move for a mistrial on the basis of the statement made by Scott with respect to Mrs. Pannell having a child by the defendant Matthews.

Your Honor, I think that was a calculated remark. I don't know how I am going to overcome the significance of that before the jury. That type statement binds them together one way or another and I don't know how any instruction or admonition can separate them.

THE COURT: I am going to have to assume the jury, when they are told to disregard something, they will do it.

MR. FIRST: Your Honor, I ask for a mistrial on that basis and also a motion for severance, as to Mrs. Pannell.

THE COURT: The motions are denied.

* * * * *

1456 October 2, 1962
Washington, D. C.

* * * * *

1465 AT THE BENCH IN A LOW MONOTONE:

1466 MR. MITCHELL: Your Honor, I would like to call your attention to an article which appears in the morning's Post. The one that appeared in last night's paper, I do not have. Do you have it in your office, Mr. Smithson?

MR. SMITHSON: This is the one from the Star. There are no names mentioned in that one.

MR. MITCHELL: In light of these articles if Your Honor please, and being it is apparent to the Court, and I represent this defendant, I would suggest to the Court that the prejudice of this man is quite obvious by these articles and pictures in the newspapers. I do not know what Your Honor will choose to do in light of this

situation but I wanted to call it to Your Honor's attention. I would ask that a mistrial be granted as to my defendant.

THE COURT: Your defendant? Whom do you have reference to?

MR. MITCHELL: Roland R. Henry, whose name is in the article.

MR. SMITHSON: I do not know what is in the News. The paragraph that appears in the Post this morning was shown to me and the one from the Star, Your Honor, I brought up. But I would like to call your Honor's attention to the fact, that while the name is the same Roland R. Henry, I would call Your Honor's attention to the fact that the picture does not in any way resemble the defendant. The only reference to him in any way is the next to the last paragraph and the last half of it, says he appeared in the District Court to go
1467 on trial along with six others on charges in narcotics. And that one sentence, I do not think calls it, it identifies six men, and there is obviously three women in this particular case, so it is obviously misleading in that respect. I do not believe that appearing in the paper calls for any mistrial.

In this particular article, which is the same one as in the News, there is no reference to the fact that he was involved in any trial.

THE COURT: That was what?

MR. SMITHSON: That he, Roland Henry -- oh, yes, it says he was on bond in a narcotic case.

MR. MITCHELL: In addition, it says also he has a conviction.

MR. SMITHSON: Yes, I saw that too.

THE COURT: We are going on now with this case, with this whole case. Do you want this back?

MR. MITCHELL: I suppose. We haven't identified them as so in the record.

THE COURT: Well, you may. This is Mr. Mitchell's?

MR. MITCHELL: Yes, Your Honor. An article from the Evening Star of October 1, 1962 and an article from the --.

THE COURT: Do you want them marked?

MR. MITCHELL: Defendant's 8 marked for identification, from the Star. There is another one from the Washington Post of October 2, 1962, appearing on page A3.

1468

THE DEPUTY CLERK: Defendant's Exhibit 9 marked for identification.

MR. MITCHELL: And an article which appears in the Washington Daily News dated October 2, 1962 at page 15.

THE DEPUTY CLERK: Defendant's Exhibit 10 marked for identification.)

MR. SMITHSON: While we are at the bench, Your Honor, I would like to have Mr. Johnson up here. I do not want to delay this any more Your Honor, and there has been a request to take testimony of Mr. Thompson. I believe if Your Honor permits it to be done, it may be out of the presence of the jury. It may be expeditiously done as to when he started that machine.

THE COURT: Is he here?

MR. SMITHSON: Yes, I have him here, Your Honor.

MR. MITCHELL: May the record please reflect Your Honor's ruling in respect to my motion?

THE COURT: Yes, I will deny the motion at this time.

MR. FIRST: I would like to renew a motion for severance.

THE COURT: Yes, it is denied.

* * * * *

1542

Washington, D. C.
October 3, 1962

* * * * *

1607

JOSEPH R. JACKSON

was called as a witness by the Defendant Gardiner and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JOHNSON:

* * * * *

1610 Q. Did your mother take your children down to visit? A. She came down to see me and in turn I told her to go over there and see Doris.

Q. You sent them Over? A. My mother came down to see me, and I sent her over with the kids to see Doris.

1611 Q. With the children. A. That's right.

* * * * *

1674 THE COURT: Mr. Johnson, who do you want to call now?

MR. JOHNSON: Mr. Smithson

MR. SMITHSON: I rise, Your Honor, to their calling me without a predicate for it.

THE COURT: There is no occasion at this time for calling Mr. Smithson.

MR. JOHNSON: If Your Honor please, with reference to the direction of my case I think it is perfectly plain why I want to call Mr. Smithson.

1675 THE COURT: Well, it may be perfectly plain why you want to call Mr. Smithson, but you told me when this case started that you wanted to have Mr. Smithson testify when you had just gotten into the case that very day. Now, there isn't anything this far in your case that would necessitate calling Mr. Smithson.

MR. JOHNSON: My suggestion is that this Government's Exhibit 15 was executed on the 15th day of --

THE COURT: Nobody has testified in this case before the jury that it was.

* * * * *

DORIS L. GARDINER,
was called as a witness by counsel in her own behalf, and, after having been sworn by the Deputy Clerk, was examined and testified as follows:

1676

MR. MITCHELL: If it please Your Honor, before this witness commences to testify I would beg leave to come to the bench.

THE COURT: Very well.

MR. ALFRED HANTMAN (Assistant United States Attorney, who was present in the court room:) May I come to the bench, too, on this, Your Honor?

THE COURT: Yes.

(AT THE BENCH:)

MR. MITCHELL: If Your Honor please, out of an abundance of caution and in protection of the record on behalf of the defendants whom I represent, and I assume I am joined in by the other defendants except Mr. Johnson, perhaps, I move Your Honor at this time for a mistrial and ask Your Honor at this time, for the purpose and benefit of this record, and I suggest to Your Honor that the basis for this application is this:

We, having observed what has gone on out of the presence of the jury, are in a reasonably fair position to anticipate what is going to happen; we know what the testimony was and what it will be on direct and cross-examination. I say most sincerely as counsel for the two defendants I represent and on behalf of my colleagues, associate counsel in this case, that the nature and character of the testimony that will unquestionably be developed in the course of the examination of this witness will so firmly and

1677

positively prejudice, in effect, the rights of the defendants that with all of Your Honor's might and all of Your Honor's efforts you could not cure or remedy it by any admonition to the jury or cautionary instruction.

Therefore, if Your Honor please, we would move first, not to allow the witness to testify, which I suppose couldn't very well be done because she has a constitutional right to do so, and on the contrary, grant the several motions we have heretofore made in this connection.

THE COURT: (Addressing Mr. First): Do you join in this?

MR. FIRST: Yes.

THE COURT: Very well. I deny your motion.

*

Washington, D. C.,
October 4, 1962.

The above-entitled cause came on for further hearing before the HONORABLE BURNITA SHELTON MATTHEWS, United States District Judge, and a jury, at 10:05 a.m.

1715

* * *
P R O C E E D I N G S

(The following occurred out of the presence of the jury:)

MR. SHORTER: Your Honor, Mr. Mitchell called me this morning and said that he was having trouble with his leg. I think Your Honor might have noticed he was limping around just a little the past two days, and he said he was having tremendous pain with it, and that he was going -

THE COURT: I haven't noticed his limping and didn't know that he was indisposed at all.

MR. SHORTER: Well, he was limping, Your Honor, and said he was going to the doctor, - to the hospital, this morning, and he said that since we are at a portion of the case that doesn't particularly affect his clients, he asked me to represent his clients for him; and I spoke to Mrs. Phelps and Mr. Henry and they have said it is agreeable with them, and I, of course, have consented to do it for him.

THE COURT: Mrs. Phelps, is it agreeable with you --

MRS. PHELPS: Yes, Your Honor.

THE COURT: -- for Mr. Shorter to look after you while Mr. Mitchell is away?

MRS. PHELPS: Yes, Your Honor.

THE COURT: Today?

MRS. PHELPS: Yes, Your Honor.

1716

THE COURT: Mr. Henry?

MR. HENRY: Yes, ma'am.

THE COURT: It is?

MR. HENRY: Yes, ma'am.

MR. SHORTER: He will be in as soon as he possibly can.

THE COURT: Very well.

Bring the jury in.

(The jury returned to the court room.)

Thereupon

DORIS L. GARDINER,

one of the defendants, having been previously sworn, resumed the stand, and was examined and testified further as follows:

DIRECT EXAMINATION, (Continued)

BY MR. JOHNSON:

Q. Mrs. Gardiner, yesterday evening, at the close of the day, you were telling Her Honor and the ladies and gentlemen of the jury, concerning your experiences on March the 8th.

With regard to the period of questioning that you said started on that evening, can you give us your best approximation as to the time of day it was that it started? A. It was after I arrived at the office. It was after I arrived at the narcotics office.

1717 Q. Now, you have indicated previously in your testimony that it was some time after - five or ten minutes after four, when the narcotics officers approached you at Upshur Street. Can you give us your best approximation of how much time elapsed between that time and the time that you say you arrived at the narcotics office? A. I think I arrived at the narcotics office about five or ten minutes to five.

Q. Now, will you tell Her Honor and the ladies and gentlemen of the jury who was present during the -- I beg your pardon, may I withdraw that.

You have indicated to Her Honor and the ladies and gentlemen of the jury who was present at the beginning of your questioning period. Did there come any time after that when anyone of the persons then present left the room? A. Officer Wurms came in once or twice and talked to me and left, and Officer Broadnax --

THE COURT: The reporter is having difficulty understanding you.

THE WITNESS: I'm sorry.

MR. JOHNSON: I'll have her repeat it, if Your Honor didn't --

THE COURT: I think I understood.

BY MR. JOHNSON:

Q. With regard to the period that elapsed between the time that
1718 the questioning first started, and the time that Officer Broadnax came in,
during that period of time had you agreed to make any statement? A. I
had not.

Q. Had you admitted any trafficking in drugs or handling drugs?
A. I had not.

Q. Now, when Officer Broadnax, whom you came to know as Officer
Broadnax at that time, came in, can you tell us what happened? A. I
had my back turned to the door, facing the window, between Officer Reed
and Officer Heneghan. I think it was Officer Henegahn asked me to turn
around to see if I recognized this fellow. I did, and I recognized him as,
I said, as Ricky, and he told me that was Thomas Broadnax, the agent.

Q. What, at that time, happened to you? A. I became quite upset
and I had to leave the room.

Q. Describe to the jury, as near as you can, with reference to
what you did, if anything, and what the agents did. You said you became
upset. Now, how was that evidenced, what outside evidence was there of
your upset? A. I asked Officer Broadnax why would Joseph Jackson do
this to me, and he said it was one of those things, he was jammed up
against the wall; I says, "He knows I was on good time, and I just came
out of the penitentiary."

1719 THE COURT: Would you read the answer if you got it?

Mrs. Gardiner, when you get too close to that, it will distort your
voice, and I think if you would speak just a little louder we would all be
able to hear you.

Would you read the answer, please?

(Answer read by the reporter.)

BY MR. JACKSON:

Q. You indicated to the jury that you started crying at that time?
A. I did.

Q. Was it just simply just tears falling or however else was it?
A. I was quite upset; it was more than tears.

Q. It was more than tears? A. Yes.

Q. What, if anything, did they do about your condition? Did they
continue to question you, or did they stop questioning you? A. At that

time, one of the officers sent for some sodas.

THE COURT: Sent for some what?

THE WITNESS: Coca Colas. And I had some aspirins and some tranquilizers in my pocketbook, and they allowed me to take those.

1720 Q. Now, did you remain in that same room? A. I did.

Q. When you took the Coca Cola and the aspirin, is that correct?
A. Yes.

Q. And, now, where were these aspirins and these tranquilizers?
A. In my purse.

Q. Now, what happened to the aspirins and the tranquilizers that you took on that occasion, after that? A. I put them back in my purse, the other ones.

Q. I see. Now, do you know where those aspirin and those tranquilizers are at the present time, or the last time you saw them? A. When I signed for my property, at the Women's Bureau, they wouldn't give them to me there.

Q. They would not give them to you? A. No.

Q. Was that when Officer Heneghan and Officer Reed took you to the Women's Bureau? -- How did they get them; how did the Women's Bureau get them? You said they would not give them to you. How did they get them? A. When they book you at the Women's Bureau they take all of your property.

1721 Q. Now, in your property did they take these aspirin and these tranquilizers? A. No.

Q. Well, how did they get hold of them, then? A. They should be at the Women's Bureau, because it is part of my property, still there.

Q. I see. Did they take them away from you when you entered there as a prisoner, the Women's Bureau? A. Yes.

Q. And when you left they would not return them to you? A. No, my keys and a few other articles.

Q. So far as you know they are still there, is that correct? A. Yes.

Q. Now, how long a period of time elapsed after you had taken the

tranquilizers and the aspirin, did the questions start again?

MR. SMITHSON: I don't know that counsel should again testify, Your Honor; he is obviously testifying that the conversation began again.

THE COURT: Mr. Johnson, the rule is that you are not to lead the witness, when it is your witness.

MR. JOHNSON: If Your Honor please, I was merely trying to hurry this along. I can ask the questions step by step.

1722

THE COURT: What is what you should do.

MR. JOHNSON: Well, I will do that.

BY MR. JOHNSON:

Q. What happened next? A. They started questioning me again, about ten or fifteen minutes.

Q. Now, at this time, what did they tell you with reference to your conversation? Tell Her Honor and the ladies and gentlemen of the jury exactly how it happened. A. They told me that they had watched me, and that they had some papers, they had seen me when I left home, they had seen me in the company of some known addicts, which they named; they read from some papers the time that they had seen me, where I went, what I did, and the time that I gave the drugs to Broadnax.

Q. Now, did they tell you how many days they had watched, or seen you? A. I think, I am not sure which one, but I think it was 77 days.

Q. 77 days? A. Yes.

Q. And did they show you anything that they had in their possession? A. They showed me some papers, reports; they showed me some pictures, and they showed me two folders, one of Roland Henry and one of Ellen Phelps; they showed me a picture of Charles Matthews.

1723

Q. By this time had you completely recovered? A. No.

Q. Did there come a time thereafter that you gave in to their questioning?

MR. SMITHSON: I think the question is improper, Your Honor.

THE COURT: The objection is sustained to the form of the question.

BY MR. JOHNSON:

Q. Did there come a time thereafter when you made answers to some of their questions that seemed to satisfy them?

MR. SMITHSON: Objection to the form of the question.

THE COURT: The objection is sustained.

BY MR. JOHNSON:

Q. Will you tell Her Honor and ladies and gentlemen of the jury, what the nature - the questions, how many people were asking you questions, and everything about it? A. Agent Heneghan, Agent Reed and Agent Jones was present. They told me that I was in a lot of trouble, that
1724 this would be my third conviction, that I had five sales on me, which was 15 counts, that I was facing 10 to 40 years on each count, and that if I cooperated with them they would help me.

Q. In what way? A. They told me they would talk to the United States Attorney about having the charge dropped.

Q. Anything else? A. They told me that as far as any -- they couldn't do anything about my conditional release because it was under the District, but they would write a letter to Mr. Rivers and ask that I be able to make bond.

Q. Did they tell you why, that they would dismiss all the charges against you if you talked? A. They told me that it wasn't me that they wanted; it was some other people that they had been investigating.

Q. Did they name those people? A. Yes.

Q. What did they show you about those people, in addition? A. Some written papers, memorandums, they showed me Charles Matthews' picture; it was a tall -- I mean a full length picture, standing up; they showed me Ellen Phelps' picture which, the picture was made in the precinct, I presume, because it had a number on it.

1725 MR. SHORTER: Your Honor, may we come to the bench?

THE COURT: Yes.

(At the bench:)

THE COURT: You know I admitted that Government's Exhibit No. 15 and took all that part out about the numbers of these defendants.

MR. SHORTER: I know you did, Your Honor, but that is the danger of having joint trials when one defendant has to take the stand and testify in her own behalf.

THE COURT: Well, Mr. Johnson must have told her before she went on the stand.

MR. JOHNSON: Your Honor has warned me not to lead her.

THE COURT: Certainly you could have told her beforehand to say nothing about these pictures.

MR. JOHNSON: I was afraid to suggest anything about it. I don't think I suggested any answer this witness may give.

THE COURT: Just take your seats again; I will straighten it out.

MR. SHORTER: May I then, on behalf of the two defendants who were named, Mrs. Phelps and Mr. Matthews, move for a mistrial?

1726 THE COURT: Yes. I will deny the motion.

(In open Court:)

THE COURT: The jury is instructed to disregard what the witness has said relative to the pictures that she saw.

BY MR. JOHNSON:

Q. Did they delineate - Did they give you any indication as to what nature your cooperation should take? A. Rephrase that, please.

Q. Did they take -- Did they indicate to you, by word or in any other way, what specific thing they wanted you to do or say, in the nature of cooperating with them, in order to get their help? A. They wanted me to involve the three people that I named, in the charges that I was charged with.

Q. What did you do with reference to that? Did you have any conversations with them about that, or, about those people A. I told them that I didn't know Roland Henry; I told them that I had lived in Southwest for some time; I knew Ellen Phelps, but we didn't have close relationship; but I did know Charles Matthews, and I did know he was in the drug traffic.

Q. Now --

1727 MR. SMITHSON: May I have the last of that answer read. I didn't hear it.

THE WITNESS: I did know Charles Matthews, but I didn't know he was in the drug traffic.

MR. SMITHSON: May I ask the court reporter to read it, because

I think the witness changed it from the first time.

THE COURT: Read the answer.

MR. SHORTER: May I protest against this. The witness was asked what her answer was. Now, as to whether she changed it or not, the last answer that she gave is her answer.

MR. SMITHSON: Wait a minute. I am not bound by your comment, sir.

THE COURT: Just a minute. The answer may be read.

(The reporter read the answer referred to: "I told them that I didn't know Roland Henry; I told them that I had lived in Southwest for some time; I know Ellen Phelps, but we didn't have close relationship; but I did know Charles Matthews, and I did know he was in the drug traffic.")

THE COURT: Now, members of the jury, you are to disregard completely what this witness said that she told them about Charles Matthews, other than you may consider that she said she knew him, but not what she said about him; you are to disregard that completely, and the reason that I give you this instruction is that the statement is not admissible evidence with regard to the defendant, Charles Matthews.

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MR. SHORTER: Your Honor, I think we have reached a very serious point in this matter, and I think that the reporter's comment should be put on the record, as to whether or not he heard what the witness said, because he read something that he has later said that he wasn't certain as to whether or not he got all the answer, Your Honor.

THE COURT: Mr. Reporter, would you mind putting in the record what you said, if anything.

MR. SHORTER: He was making a comment that Mr. Smithson interrupted, after he finished reading what he had taken down as the witness's first answer.

THE REPORTER: Your Honor, I wasn't sure whether she said she did or did not.

THE COURT: Would you put your statement on the record.

THE REPORTER: Yes, ma'am.

I wasn't sure whether the witness said she did or did not, when I

read the answer back.

THE COURT: Did or did not what?

THE REPORTER: Did or did not know -- whether she said, "I did" or "did not know he was in the drug traffic."

MR. JOHNSON: Does Your Honor want to instruct them to disregard that also?

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THE COURT: I have already told the jury that whatever she said about any business Matthews was engaged in is to be disregarded by the jury, completely, because it is not admissible evidence as to Charles Matthews.

Now, you may proceed.

BY MR. JOHNSON:

Q. Now, did there come a time after that, after you had this conversation in which you told them that you did not know Roachie, or Roland Henry, did there come a time when you agreed to say that you did? A. Yes.

Q. And, did there come a time -- Were you then resisting their efforts to obtain the statement from you?

MR. SMITHSON: Your Honor, would the Court please admonish --

THE COURT: Mr. Johnson, all she needs to do is to say yes; so that it is, in effect, you giving her the whole testimony that you want her to give. Now, your questions must not be leading; they must not indicate to her what answer you want.

Now, I have admonished you time and again and you must respect the admonition.

BY MR. JOHNSON:

1730

Q. Did there come a time -- You indicated to Her Honor and the ladies and gentlemen of the jury that at first you denied these statements. Did there come a time when you stopped denying them? A. Yes, after asking them what they wanted me to do.

Q. And what happened after that? A. They told me who they wanted me to involve.

Q. And what did you do about it? A. I first told them that I

couldn't give those people's activities; I couldn't tell them anything about their activities.

Q. Yes, go ahead. A. And Officer Heneghan told me that on several occasions he had seen some of them come into the store.

Q. Now, did anyone at any time indicate to you when the interrogation would stop? A. No.

Q. Did there come a time when you saw Government Exhibit No. 15, on the evening of March the 8th?

MR. JOHNSON: Your Honor, may I tell her that the thing was not originally like that, that parts have been cut out. I asked her if she saw it, and it may not be in the same condition. May I tell her that?

THE COURT: The Court directed certain things eliminated on the third page.

MR. JOHNSON: And on the first page, if Your Honor please.

1731

THE WITNESS: I'm not sure; I don't think I did.

BY MR. JOHNSON:

Q. Did Agent Heneghan, from the time the questioning started, until it ended, whenever that might be, did he ever leave the room? A. For a while he did, not long; for a while he left, but not for long.

Q. Approximately how long was it? A. Maybe ten or fifteen minutes.

Q. Now, you have indicated to us that the agents were questioning you; were they questioning you one at a time, or how were they questioning you? A. Sometimes they would question me one at a time and sometimes they would cross-cut each other.

Q. All three of them? A. Agent Jones wasn't in the room at all times.

Q. I see. How about the other two, are you indicating that they are the ones that cross-cut each other and questioned you? A. Yes.

Q. Did there come a time when the questioning ceased? A. Yes, about, I imagine about a quarter of ten.

Q. Now, directing your attention to March the 15th of the same year, approximately one week and one day later, one week later - did there

1732

come a time when you went to the United States District in this building and saw Mr. Smithson? A. Yes.

Q. When you saw Mr. Smithson for the first time --

THE COURT: Mr. Johnson, before you go on with that, there is one thing I would like to say to the jury.

A while ago I told you a certain statement she made with reference to Matthews was inadmissible. I mention that particular statement because that was the statement that was under discussion at that time.

I told you the other day, and you are to keep in mind, that what this particular witness said down at the Narcotics Bureau is admissible as to her but it is not admissible as to the other defendants that she has mentioned in that statement. And the same is true as to her testimony here today, and you are to keep that in mind.

Now, Mr. Johnson.

BY MR. JOHNSON:

Q. When you arrived at the office in which you saw, or the room in which you saw Mr. Smithson, who, if anyone, was present? A. Officer Heneghan and Officer Reed, and the female marshal, Miss Eleanor.

1733

THE COURT: Mrs. Gardiner, when the reporter is writing down what you say, he is not able to look at you, he has to look at his equipment, and so, therefore, he doesn't have the benefit of seeing your face, like the rest of us do, so you must speak a little louder.

THE WITNESS: I am awfully sorry.

THE COURT: Not quite so close to the loud speaker because it distorts your voice if you put your mouth right on it.

BY MR. JOHNSON:

Q. Now, with these people present, did you have conversations with Mr. Smithson? A. I did.

Q. Will you tell Her Honor and the ladies and gentlemen of the jury what those conversations were? A. Mr. Smithson told me that he understood, through Officer Heneghan and Officer Reed, that I had been arrested for sales and possession of narcotics, that I had answered and made a statement at the Treasury Department and I wanted to cooperate

with the Government by being a Government witness.

Q. Did he say anything else to you? A. He said, if I cooperated, decided and cooperated to be a Government witness, he would drop all charges against me, if I would testify.

1734 Q. And what did you do with reference to that statement? A. And he also said that the details from the narcotics squad was not enough, and I would have to go into further details.

Q. Now, did there come a time when - How long did - I withdraw that.

How long did this conference last, without interruption? A. About a half an hour.

Q. Did there come a time when anyone else, other than the persons you have named, came to the room? A. I talked to Mr. Smithson about my good time; I told him I was on conditional release; I had four years back-up time. And I told him I would like to speak to my parole officer, Mr. Gordon Davis, which he made arrangements for me to talk to.

Q. Did you? A. Yes, I talked to him.

Q. Now, was he the next person that came into the room? A. I'm nor sure if he was the next one or Mr. Tinney was the next one.

1735 Q. Now, did you know, prior to the time that Mr. Tinney came into the room, that he was coming into the room? A. Mr. Smithson asked me if I had an attorney and I told him no. He asked me if I knew Mr. Tinney that worked in the Catfish Turner case; I told him, no. He said that he was going arrange for me to talk to him which he did.

Q. Did Mr. Tinney come into the room? A. Yes.

Q. Did you have a conversation with him in front of Mr. Smithson?
A. Only an introduction.

Q. What happened with reference to the persons that were present when Mr. Tinney came into the room? A. They went outside of the door.

Q. Did the lady marshal go out also? A. Yes.

Q. Did you talk to Mr. Tinney? A. I did.

Q. What was your conversation with Mr. Tinney? A. I told Mr. Tinney what had occurred that night before at the Treasury Department

and asked him what should I do.

Q. And what did he tell you to do? A. He told me to cooperate with Mr. Smithson and the Federal narcotics agents to the fullest extent.

1736 Q. What happened after he gave you that advice? A. I talked a little more about a bond; we talked about my good time.

Q. What, if any, conversations did you have about a bond? A. He asked me if I could make bond, and I told him I could if my bond was cut. He said he would talk to Mr. Smithson about it after, later that afternoon.

Q. Now, after that conversation transpired and Mr. Tinney left the room, did anyone else come into the room? A. Officer Reed and Officer Heneghan and the female marshal.

Q. Did Mr. Smithson come back into the room? A. Yes.

Q. Did you have any further conversations with Mr. Smithson? A. Yes, he asked me was I satisfied with Mr. Tinney; I told him he advised me to go along.

Q. What happened after that? A. Mr. Smithson left and Mr. Tinney left; Mr. Heneghan and Mr. Reed came back into the room with me and began questioning me again.

1737 Q. In what room did this questioning take place, was it the same room? A. Yes. I think it's a back room from the files; there is a lot of files; it's a large room. I am not sure what type room it is.

Q. Now, how long did they talk to you in that room? A. From around, I think, from around ten, maybe around eleven o'clock, till something to three.

Q. To something to three. A. Yes.

Q. Were you given any food? A. I was.

Q. At what time? A. I'm not sure, maybe around 12 or 12:30; I'm not sure, but they had asked if I was hungry before.

Q. Now, when you finished at 3 o'clock talking to Agents Heneghan and Reed what, if anything, happened to you then? A. They told the female marshal to carry me back to the cellblock and to hold me; they would come downstairs and have some more papers for me to sign.

Q. Did they take you to the cellblock? A. Miss Eleanor carried

me to the cellblock.

Q. How long were you in the cellblock? A. I think it was around 5, 5 or 5:30.

Q. Who came to the cellblock to see you, if anyone? A. Officer Heneghan and Officer Reed.

1738 Q. Did they have anything with them? A. They had a stack of papers.

Q. Can you tell us, from your best recollection,- first, did you read them? A. I did not.

Q. Did you sign them? A. Yes, I did.

Q. Did anyone indicate to you where you were to sign? A. Mr. Reed told me there were some typographical errors in some places of the statement; he showed me where they were and told me to initial them; and he also told me to sign it on the back.

Q. Do you recall whether you signed Government Exhibit 15 at that time or not? A. I'm not sure. It was a stack, it was about 15 or maybe 20 papers together, and I'm not sure.

Q. Had you signed any paper prior to that time? A. I had not.

Q. Directing your attention -- Did anybody indicate to you that you were to go before the Grand Jury? A. Not on that day.

Q. Did you get any advice from Mr. Tinney about the Grand Jury? On that day, on the 15th. A. No.

1739 Q. Did there come a time when you were summoned to go to the Grand Jury? A. Mr. Heneghan and Mr. Reed came to the jail and told me I had to go before the Grand Jury to testify.

Q. Did they have any other conversation with you? A. They told me that they would put it down on the Court sheet that I could come - was coming for an interview, so that the other people in the jail wouldn't know where I was going; and I told them it didn't make any difference.

I think Mr. Tinney visited me at the jail the day before I went before the Grand Jury and he told me that I would have to testify as to the things that I had said on the 15th.

Q. Now, tell me this, Mr. Tinney visited you at the jail, did he

have any difficulty in seeing you at the jail, when he came in? A. No, he did not.

Q. Did any other attorneys attempt to visit you at the jail? A. I had several other attorneys that attempted to visit me at the jail and they were stopped.

Q. Do you know why they were stopped? A. I'm not sure as to why, but, Mr. Tinney wrote a letter to the jail, to Mr. Sam Anderson, the Superintendent, and told him he was representing me in this case, and that I was to see no other attorneys unless I requested them.

1740 THE COURT: Unless you requested them?

THE WITNESS: Unless I requested to see them.

BY MR. JOHNSON:

Q. Did there come a time when you were brought to the United States District Court building to go before the Grand Jury? A. Yes.

Q. What time was that, approximately? A. I came with the regular court load; that's about 8 o'clock in the morning.

Q. Do you know what day it was of the month, or what month? A. I think it was on the 19th of March.

Q. At this time, when you got to the courthouse, did you have any conversations with any person about your testimony before the Grand Jury? A. Yes, I told Mr. Heneghan and Mr. Reed and Mr. Jones that I wasn't going to testify, that the detainer hadn't been lifted off me for my good time, and nothing had been done about my bond, and I wasn't going to testify.

Q. And did you see Mr. Smithson? A. One of them called Mr. Smithson.

1741 Q. Who did? One of them? A. One of the officers.

THE COURT: Just a moment. The question was, did you see Mr. Smithson?

THE WITNESS: Yes.

BY MR. JOHNSON:

Q. Did - Where did you see him? A. In the outer room, just off from the Grand Jury room.

Q. What conversations did you have with Mr. Smithson at that time? A. He told me that Mr. Achison or Mr. Acheson; I'm not sure of his name; A-c-h-e-s-o-n, I think, had wrote a letter to Mr. Rivers, asking that the detainer be lifted off me, and that Mr. Rivers wouldn't agree; but he was going to write another letter and see what he could do, and he was going also to send me before Commissioner and have my bond cut.

Q. Did you see Mr. Tinney that day? A. Yes.

Q. What was the occasion of your seeing Mr. Tinney? A. He carried me before the Commissioner.

Q. Did you see him in the Grand Jury room, or in that anteroom? A. No.

Q. Did Mr. Smithson tell you anything about your bond on that day? A. He told me that after I came from the Grand Jury room he would carry me back before the Commissioner and have my bond cut.

1742 Q. Thereafter did you go before the Commissioner? A. I did.

Q. Was your bond reduced? A. It was reduced to \$2500.

MR. JOHNSON: Would Your Honor indulge me just a minute?

THE COURT: Yes.

--

BY MR. JOHNSON:

Q. Now, Mrs. Gardiner, I want you to tell Her Honor and ladies and gentlemen of the jury the complete story, without questioning from me, about your relationship with Joseph Jackson, when it began, how you felt about him, and all of the circumstances, without a question from me.

MR. SMITHSON: Objection to this, Your Honor. I think it's wholly inappropriate. We have spent so many hours on this already, and it's repetition.

THE COURT: You have asked her specific questions about this. Now you want her to go over all that.

MR. JOHNSON: No, I don't want her to go over all of it, if Your Honor please.

1743 Yesterday, I believe, the record shows that I asked specific questions and they were objected to.

THE COURT: I will overrule the objection; go ahead.

THE WITNESS: I met Joseph Jackson in 1954, just before he became involved in the robbery of which he served 3 to 9 years for. I was on bond for sales and possession of narcotics, which I was convicted for in 1955, 40 months to 10 years.

MR. SMITHSON: Your Honor, may I be heard?

Obviously it's an attempt, Your Honor, to gloss over something that is not properly part of the examination in chief. This is the weakness and the real evil on a general type question.

I must object to this form, Your Honor.

THE COURT: All you were called upon to tell was your relationship with Joseph Jackson, not what you had been convicted of or what he had been convicted of, or any of those things. Relationship has something to do with meeting him and how you saw him after that, and that type of thing.

THE WITNESS: I met him in 1955. I didn't see Joseph Jackson any more until some time in '56, after I was sent to the Women's Reformatory.

1744 I worked as somewhat as recreation director for the women's division; Joseph Jackson worked as movie projectionist. He came to the Women's Reformatory every Friday. Sometimes he would come during the week, because he was a mechanic, and the trucks that came to the institution, he would come and fix them.

I worked in the culinary unit, and I would feed any of the male inmates that came there; I made sandwiches and coffee for them.

Joseph Jackson and I became intimate; we started writing letters, exchanging gifts; and that went on for about 2 or 3 years, about 2 years, 2 and a half years. We discussed marriage when we came out. And he had his mother to write me while I was there. He sent his kids to visit me.

When he was released he came back and visited me, under an assumed name, because there they don't let ex-inmates visit you if they know it. I had him added to my mailing list as Jameel Ahmad.

THE COURT: You are getting too close to that loud speaker. It distorts your voice. Sit back just a little bit.

THE WITNESS: I had him added to my mailing list as Jameel Ahmad.

THE COURT: You had him added to your mailing list as what?

THE WITNESS: As Jameel Ahmad; that was the name we used.

1745

He went on, he was released in April, the 2nd Saturday in April of, I think '60. He sent me money that next visiting Sunday by my uncle. On the 4th Sunday of April he visited me he was recognized by one of the male guards.

THE COURT: Well, now, I wonder if we could shorten that a little bit.

MR. SMITHSON: I again object to the whole thing. Your Honor, as just repetition of everything that was answered in direct.

THE COURT: How many times did he visit you after he left there and you remained there, can you tell us that?

THE WITNESS: He visited me one time and they sent him back for two months.

THE COURT: Just a minute. He visited you one time when?

THE WITNESS: He visited me one time before they sent him back; they wouldn't let him visit me any more.

THE COURT: Go ahead.

BY MR. JOHNSON:

Q. Now, did there come a time after, did there come a time when you were released from prison? A. Yes.

Q. Can you tell Her Honor and ladies and gentlemen of the jury when that occurred? A. I was released December the 2nd, 1961.

1746

Q. Did there come a time when you saw Joseph Jackson after that date? A. It was the third Monday in December, after I was released, -- it was the fourth Monday in December.

Q. Now --

THE COURT: Where did you see him then?

THE WITNESS: He came to my house.

THE COURT: Did you call him or did he call you about coming or did no one call?

THE WITNESS: He called me.

THE COURT: Go ahead.

BY MR. JOHNSON:

Q. What happened with reference to your relationship with Joseph Jackson at that time? A. We continued to have a relationship.

Q. Did you renew your relationship with him? A. Yes.

Q. And, will you tell Her Honor and the ladies and gentlemen of the jury what you and he did together, what you said together, from that period up until the last time you saw Joseph Jackson, before March 8th.

MR. SMITHSON: Obviously, Your Honor, we will never get through this case. I must object.

1747

THE COURT: Well, the first thing that you are to do is to tell us what you did together, after you say that you saw him for the first time, after you got out of prison on the 4th Monday in December; what did you do together after that?

Tell us that, first.

THE WITNESS: We established a deeper relationship and --

THE COURT: Well, what do you mean by that? Tell us just exactly what you did and what he did, by what you mean by this relationship, because we don't know. We don't know whether you went to the movies together or whether you went boating together or what you did together. Tell us what you mean.

THE WITNESS: We went to different night clubs together. He visited me at my home. I visited him at his mother's. Carried me back and forth to work. And we had relationships, sexual relationships.

THE COURT: What do you mean by that?

THE WITNESS: Sexual relationships.

THE COURT: Yes.

THE WITNESS: We were intimate, personal contact.

BY MR. JOHNSON:

Q. Now, with regard to -- Did there come a time when Joseph

1748 Jackson told you something about a personal problem of his?

MR. SMITHSON: We have been over this, yesterday.

THE COURT: You are inquiring now about this Virginia and he is supposed to have been in some difficulty over there, is that what you are inquiring about?

MR. JOHNSON: Yes ma'am.

THE COURT: Wasn't that covered yesterday?

MR. JOHNSON: Ma'am, some of it was.

THE COURT: Well, I don't think we ought to cover the same thing again. Can't you direct a question that will enable you to cover that, and not all of this other, again?

MR. JOHNSON: Yes ma'am.

BY MR. JOHNSON:

Q. Now, with regard to your relationship with Mr. Jackson, did he say anything to you, and how soon prior to January 11th, did he mention narcotics to you? A. That's somewhere around the first of January.

Q. How frequently after that did he mention narcotics to you? A. We discussed it every day, practically every day.

THE COURT: You did what?

THE WITNESS: We discussed it practically every day.

BY MR. JOHNSON:

Q. Now, what if anything did he want you to do? A. He wanted me to get some narcotics for him so he could sell them.

1749 Q. Now, during that period of time, did you know Ricky? A. I had met him.

THE COURT: You had met him?

THE WITNESS: Yes.

THE COURT: When did you first meet him?

THE WITNESS: I'm not sure; it was during the Christmas holidays.

BY MR. JOHNSON:

Q. Now, did there come a time after the first of January that you did get narcotics for Joseph Jackson? A. Yes, I did.

Q. And did you continue to do that? A. Yes.

Q. Now, how frequently did you see Joseph Jackson after January the 10th? A. I saw him some time two or three times a week, sometimes more, because he told me he was going in and out of town, gambling.

Q. Now, with reference to the narcotic sales with which you are charged, and the day prior thereto, did you have conversations with him on those occasions? A. Yes. I told him I thought I would be able to get the drugs for him that day.

1750 Q. Now, in connection with his asking you to get narcotics, did he tell you anything with reference to what he had done for you?

MR. SMITHSON: Obviously, Your Honor, counsel might as well testify.

MR. JOHNSON: She can't answer that yes or no.

THE COURT: Well, Mr. Johnson, you are continually offending against the rule. Your questions are practically all leading.

MR. JOHNSON: Well, if Your Honor please, I am only trying to shorten it.

THE COURT: I would rather that you would proceed according to the rules.

MR. JOHNSON: Very well, if Your Honor please.

BY MR. JOHNSON:

Q. Will you tell us then, in your own words, without my interruption, how you came to turn these narcotics, obtain and turn these narcotics over to Ricky? A. Joe told me in the presence of Ricky that he was working in the day, and Ricky was going to work in Baltimore with some fellow named Goat, and sell the drugs in Baltimore.

Q. Now, why did you get these drugs at Jackson's request? Tell Her Honor and the ladies and gentlemen exactly why you did.

MR. SMITHSON: Your Honor, he told her what answer to put, at Jackson's request. What more you could put in a question to lead her I don't know.

1751 THE COURT: I don't know, either.

MR. JOHNSON: Your Honor, she has already testified she got it at his request affirmatively, without my leading her at all.

MR. SMITHSON: Mr. Johnson, may I just amend that? She didn't; you did, sir. I think you lead her.

MR. JOHNSON: If I did I want to apologize to Your Honor, but I am almost positive that I didn't.

BY MR. JOHNSON:

Q. But, in any event, can you tell us, Mrs. Gardiner, how you happened to get these narcotics with which you are charged.

THE COURT: All right, just let her answer that, now.

MR. JOHNSON: Yes, ma'am.

THE WITNESS: Joe told me that he was in trouble and that if he could get \$1500 he wouldn't have to go to jail; that if he could pay the man's doctor bill in Virginia he wouldn't be charged. The charges would be dropped against him.

BY MR. JOHNSON:

Q. Can you tell us, Mrs. Gardiner, how often during the period of the ten days prior to this time you had discussed -- no, I beg your pardon -

1752

Can you tell Her Honor and the ladies and gentlemen of the jury why, when the request was first made to you, you did not get narcotics? A. I hadn't mingled that much; I hadn't even been out that much, and I didn't know where to get any narcotics at that time. I hadn't tried.

Q. Did you want to get any narcotics? A. I hadn't tried.

Q. Did you want to get any? A. No, I did not.

Q. Did you know who owned the red - Do you know whether Jackson had an automobile or not? A. Yes, I thought he had one.

MR. SMITHSON: May I have the answer read back, Your Honor? She dropped her voice again.

THE WITNESS: Yes, I thought he had an automobile.

BY MR. JOHNSON:

Q. Did you know that it did not belong to him?

MR. SMITHSON: I object.

BY MR. JOHNSON:

Q. Prior to the time that you had conversations with Joseph

1753 Jackson about narcotics, that you have testified to, had you ever obtained any or sold any, since your release? A. I had never sold any since my release, and prior to that, I think it was around the 8th or 9th of, the 8th or 9th of March, I got some, a small package of narcotics.

THE COURT: 8th or 9th of March?

THE WITNESS: 8th or 9th of January.

MR. JOHNSON: Your witness.

THE COURT: Mr. Smithson, I guess you will be a little while.

MR. SMITHSON: Oh, yes, I will, Your Honor.

THE COURT: I think at this time we will take the usual five-minute recess.

(Court recessed at 11:06 a.m.)

1754

(After the recess:)

MR. SMITHSON: The jury is not here, Your Honor.

THE COURT: No. Will you bring the jury in, Mr. Wright.

(Thereupon, the jury was returned to the courtroom and seated in the jury box.)

THE COURT: Are you ready, Mr. Smithson?

MR. SMITHSON: Yes, I am, Your Honor.

THE COURT: Very well. Proceed.

(Thereupon, the witness who was on the stand prior to the morning recess, Doris L. Gardiner, one of the defendants herein, resumed the stand, and the following proceedings were had:)

CROSS-EXAMINATION

BY MR. SMITHSON:

Q. Now, your name is Doris Louise Gardiner; is that correct?

A. Yes.

Q. That is your married name? A. Yes, it is.

Q. Are you divorced? A. I am.

Q. When were you divorced? A. I think it was filed in September 1957.

1755

Q. September of '57. A. Yes.

Q. And tell me: Prior to September of 1957 you were associating with, intimate with, and living with Cornelius Parker, weren't you?

MR. JOHNSON: Just a moment. Your Honor, I don't think that is proper cross-examination.

THE COURT: Counsel will come to the bench.

(AT THE BENCH:)

THE COURT: Your question was before 1957 she was living --

MR. SMITHSON: That is right. When she went to jail the last time. The information I have is that she took the responsibility for a certain narcotic traffic in 1955; that she took it exclusively; that it is alleged that Mr. Parker was participating in it; and further than that, there was put in issue here her extra marital relationship by Mr. Johnson. It might be subject to some question if he hadn't gone into the intimacies, if you will, the alleged intimacies between the defendant and Joseph Jackson. Since that issue on the credibility is in issue I think the door is open, Your Honor.

1756 THE COURT: To tell the truth, when you first began talking about her being intimate with Joseph Jackson I thought you meant they were friends. I didn't attach anything else to it. Therefore, it was difficult for me to follow what you are trying to say now. Apparently they are relying heavily on the fact that you claim they were intimate in the sense of that they were --

MR. JOHNSON: Sexually intimate?

THE COURT: Yes.

MR. JOHNSON: I think you will recall, and the record will show, that you brought that out.

THE COURT: No. Mr. Johnson, continuously throughout this trial you used the word intimate. I am sure you did it in your opening statement.

MR. JOHNSON: That's right.

THE COURT: When you did I thought you meant they were intimate friends.

MR. JOHNSON: I have used the word intimate and every

time I think Mr. Smithson objected and Your Honor sustained it.

THE COURT: Now, we are getting off the point. You don't dispute it?

MR. JOHNSON: No, ma'am. I don't dispute the fact that they were intimate. I couldn't take any other position.

1757 But in line with the Hansborough case I think it is true that if it is admissible at all it would have to be admissible in explicit instructions. I don't think it is admissible what she did prior to the thing. What does he mean, 1920?

MR. SMITHSON: No. I mean as of 1955, sir.

THE COURT: Just a moment. What date did she go into prison?

MR. SMITHSON: Her record shows a conviction in 1955. I didn't bring the record with me. I will get it, Your Honor.

(There was a pause while Mr. Smithson returned to the counsel table to get his file.)

MR. SMITHSON: The second day of December 1955, she was on a plea of not guilty and a verdict of guilty for sale of narcotics, sentenced to 20 months to 5 years and a fine of \$2,000 on Count 1, 20 months to 5 years and a fine of \$2,000 on Count 2, said sentence to take effect at the expiration of the sentence in Count 1 as to imprisonment only, 20 months to 5 years and a fine of \$2,000 in Count 3, said sentence to run concurrent with the sentence in Count 1 as to the prison sentence only. The sentence is for 10 years.

THE COURT: Going back to this, what is your theory? Credibility?

MR. SMITHSON: Credibility. She said she was in love and is putting up a picture of injured virtue, if I may be somewhat cynical about it.

1758 I can show she had this relationship and she told Joseph Jackson she resumed part of this relationship with Neil or Cornelius Parker, and visited him quite frequently after getting out December 2, 1961.

MR. JOHNSON: Are you going to show that by Joseph Jackson?

MR. SMITHSON: And by her statement itself.

MR. JOHNSON: I don't think it is admissible under any circumstances.

THE COURT: I believe it is admissible on the question of credibility.

MR. JOHNSON: If Your Honor please, it isn't an issue. That would be an issue if an issue of chastity was involved.

THE COURT: It is a matter of credibility, nothing but that.

MR. JOHNSON: She said she met him after she went to prison, Jackson. She met him for the first time in 1955 and didn't see him again until she saw him in prison. At that time they started a relationship that ripened into something else.

1759 THE COURT: If I understand what he is proposing to show it is that she had this relationship with this man before she went to prison, that she resumed it after she got back from prison, all the time claiming she was devoted to this man Jackson.

All right.

(IN OPEN COURT:)

MR. JOHNSON: There is one thing I want to take up.

(AT THE BENCH:)

MR. JOHNSON: If Your Honor please, because of the nature of the charges made and the testimony --

THE COURT: Of the what?

MR. JOHNSON: The charges that are implicit in the testimony of the Defendant Gardiner, I have notified the United States Attorney of the fact that I thought Mr. Smithson would be a witness.

THE COURT: I wonder if we couldn't take that up some other time.

MR. JOHNSON: I don't think he ought to cross-examine her.

THE COURT: I think he should. He has been in the case since the beginning and you came in on the date of trial.

MR. JOHNSON: And I notified him on that date. I wasn't in the case before.

(IN OPEN COURT:)

MR. JOHNSON: Your Honor, Mr. Tinney is in the courtroom. I guess he better be excluded.

1760

THE COURT: Do you expect to call him?

MR. JOHNSON: Yes, ma'am, I have to.

THE COURT: Very well. Mr. Tinney, I understand you are going to be called as a witness. Therefore, I will ask you to leave the courtroom, please.

(Thereupon, Mr. Tinney, who was seated in the rear of the courtroom, left the courtroom.)

MR. SMITHSON: Shall I continue, now, Your Honor?

THE COURT: Yes.

(The witness, Doris L. Gardiner, one of the defendants herein, resumed the stand and the following proceedings were had:)

BY MR. SMITHSON:

Q. Directing your attention to 1955, you had a close and intimate relationship with Cornelius Parker in that period of time, did you not?

MR. JOHNSON: I object.

THE COURT: The objection is overruled. You may answer.

THE WITNESS: Yes. Beginning in October 1954.

BY MR. SMITHSON:

Q. In October 1954. In fact, you resumed that relationship after you got out of custody in 1961; isn't that true? A. We were still friends.

1761

Q. Close, personal, intimate friends? A. I couldn't say that, Mr. Smithson.

Q. Well, you said it to Joseph Jackson, didn't you? In fact, didn't you tell him you were close and personal and you had to call on Cornelius Parker two or three times in a week? A. I don't remember telling him that.

Q. Do you deny you told him that. A. Yes, I will.

Q. You will. A. Uh-huh.

Q. Now, you, at one time, told us during your lengthy direct examination that you had never trafficked in drugs, was your statement.

You are the same Doris L. Gardiner who, on December 2, 1955, was convicted of the sale of narcotics, heroin; isn't that true?

A. I can tell you I wasn't.

MR. JOHNSON: Just a second. If Your Honor please, I want to object. This young lady has already testified that she was convicted of narcotics and she was in prison for it and this certainly isn't any impeachment of her.

1762 THE COURT: Mr. Johnson, I am sorry but it is a standard rule that the opposite side may ask about these convictions. It runs as to credibility.

MR. JOHNSON: I agree with Your Honor, but I --

THE COURT: You are out of order, Mr. Johnson. Will you please be seated.

MR. JOHNSON: Your Honor, may I state my --

THE COURT: No. You may not.

BY MR. SMITHSON:

Q. You are the same Doris Louise Gardiner who was convicted of the sale of narcotics and sentenced on December 2, 1955? A. Yes.

Q. And in that regard, Mrs. Gardiner, you had a prior conviction, right, of narcotics on the 14th day of October -- correction -- not narcotics, but for trafficking and sale of marihuana? A. Yes.

MR. JOHNSON: I object, of course, to that, too, Your Honor. I imagine Your Honor gives the same ruling?

THE COURT: Certainly.

BY MR. SMITHSON:

Q. And you are the same Doris Louise Gardiner who, on October 29, 1948, was arrested and convicted of shoplifting and petit larceny?

1763 A. Yes.

MR. JOHNSON: I object to that, if Your Honor please. Same ruling?

THE COURT: Mr. Johnson, I don't want this interrupted again with that same objection. I told you before you began that these convictions are admissible on the point of creditility.

BY MR. SMITHSON:

Q. Directing your attention to September 27th, 1950, are you the same Doris L. Gardiner, who was arrested and convicted of larceny here in 1950, September 27? A. Mr. Smithson, I cannot answer those dates correctly because I am not sure, but I do have a record for shoplifting and I have a prior conviction for marihuana. I am now doing back-up time on the ten years' sentence for sale and possession of narcotics.

THE COURT: Just answer the question.

MR. SMITHSON: May the answer be stricken, Your Honor, as not responsive?

THE COURT: Yes. Listen to the question and answer it.

BY MR. SMITHSON:

1764 Q. Your best recollection: Are you the same Doris Gardiner who, on December -- September 27, 1950, was arrested and convicted in the District of Columbia? A. Mr. Smithson, I cannot remember dates, but I have been convicted for larceny.

Q. How about in Montgomery County, Maryland, on February 24, 1950, conviction for shoplifting? A. I have never been convicted in Maryland for shoplifting.

Q. And in Arlington County, Virginia, on November 15, 1951, for grand larceny? A. Yes.

Q. And on April 22, 1954, Arlington County, for grand larceny, possession of stolen property, and grand larceny was cut to petit? A. I have only served one sentence in Arlington.

Q. How about in March of 1954, the 4th of March, in the Municipal Court for the District of Columbia, for shoplifting? A. As I said, I can't remember dates, but I have been convicted for shoplifting.

Q. You have told us that Joseph Jackson called on you at the jail using some name, but actually you were the one that instigated that by making it possible by adding his name to your list; isn't that true?

1765

MR. JOHNSON: I object. There is no testimony he called at the jail at any time, Your Honor.

MR. SMITHSON: Correction. Counsel is right. At Lorton.

THE WITNESS: We had to agree to that, Mr. Smithson. That was the only way he could visit me.

BY MR. SMITHSON:

Q. But it was your instigation that permitted him to make that entry; you put his name on that list; right? A. I would have to add it to my list.

Q. Tell me: When did you meet Ricky? A. It was sometime during the Christmas holidays.

Q. Before Christmas? A. No. Between the -- the Christmas holidays between Christmas and New Years.

Q. Between Christmas, the 25th, and the 31st, New Years? A. Or the first. Christmas to New Years.

Q. Was it at a New Year's party? A. No. It was at my house.

Q. Before New Year's, then? A. As I said, Mr. Smithson, I am sure it was between the Christmas and the New Year holiday, after Christmas.

Q. Now, Mrs. Gardiner, you have told us you obtained this narcotics; is that correct? A. Yes, I did

1766

Q. It's quantity bulk narcotics, is it not? A. You have to break that down a little for me.

Q. It wasn't in cap form, was it? A. It was just the way I saw it exhibited.

Q. In other words, these exhibits, which is the -- the manner in which the agent Broadnax told you he received it is just as you delivered it to him? A. Yes.

Q. Now, were you in any way an intimate friend of Mr. Broadnax? A. I was not.

Q. You were perfectly willing to let Broadnax have these narcotics? A. Yes, I was.

Q. In fact, you were already dealing in narcotics and had been since the latter part of December 1961, when Broadnax first met you; is

that true? A. No, it is not.

Q. Well, now, that is what you told the agents; isn't that right?

A. I told the agents quite a few things that wasn't true.

1767 Q. Well, let's put it this way: You have identified a party as the one giving you some money and some narcotics for sale; isn't that true?

A. I identified three people, sir.

MR. SMITHSON: Your Honor, I think for the examination of this witness the jury ought to again be admonished that part of this examination will not be admissible as to other defendants.

MR. SHORTER: Could we come to the bench, Your Honor?

THE COURT: Yes.

(AT THE BENCH:)

MR. SHORTER: Your Honor, if the suggestion is that some questions are going to be asked of the witness to elicit statements and evidence not competent against people who are going to be mentioned, I don't see the purpose of having it come out.

THE COURT: The purpose is in reference to this defendant.

MR. SMITHSON: That's right.

THE COURT: We have gone into this many times and I made the ruling and the ruling is the same.

MR. JOHNSON: May I say this, Your Honor. It isn't impeaching her because she admitted all these sales.

1768 THE COURT: Well, --

MR. JOHNSON: She admitted every one.

MR. SMITHSON: I am glad your conclusion is different from mine, Mr. Johnson.

THE COURT: Proceed.

(IN OPEN COURT:)

THE COURT: Members of the jury, it is obvious from the questions that have been asked here that the witness is going to be asked questions about these statements that she allegedly made to the narcotics officers.

Now, you are told again that this testimony as to what she told them is admissible and may be considered as to her, Doris Gardiner,

but it is not admissible and it is not to be considered by the jury as against the other defendants who are present here and you are to keep that in mind.

BY MR. SMITHSON:

Q. Now, Mrs. Gardiner, when you came out of prison on December 2, 1961, that was the day, wasn't it? A. Yes, it was.

Q. It wasn't the latter part of December, as you indicated? A. I said December 2, 1961 .

Q. And when you came out you went to work at this Gordon's Supermarket, at a certain time; is that correct? A. Yes.

1769 Q. And you came to meet one Charles Matthews by his calling on you; is that true?

MR. SHORTER: Objection, Your Honor.

THE COURT: The objection is overruled as to this question.

BY MR. SMITHSON:

Q. Did you not? A. Rephrase that, please. State that again, please.

MR. SMITHSON: Will the reporter read the question, please?

THE COURT: Yes.

(Thereupon, the reporter read the last question propounded to the witness as follows:

"Question. And you came to meet one Charles Matthews by his calling on you; is that true?")

MR. SHORTER: May I add to the objection, Your Honor? This is beyond the scope of direct examination. I do not recall this witness having said anything about Mr. Matthews, when she met him, in her direct testimony.

THE COURT: There was testimony as to how long she had known Matthews.

MR. SHORTER: She said she had known him for twenty years.

1770 THE COURT: I am going to rule that you are out of order.

MR. JOHNSON: I join in the objection.

THE COURT: Yes, all of you may have the objection.

BY MR. SMITHSON:

Q. Isn't that correct? A. I saw Mr. Matthews, yes, after my release from prison.

Q. In fact, he looked you up and asked you if you needed money. A. No, that's not true.

Q. And he gave you \$50? A. The first time I saw him he gave me some money, but I am not sure how much.

Q. He told you he would let you have some heroin on consignment? A. No, he did not.

Q. You told the agents that, did you not? A. Yes, I did.

Q. And the agents put it in that statement which you signed? A. Which I agreed to.

Q. You signed it? A. Yes, I did.

1771 Q. Did you tell them at that time that on the 8th or 9th of January 1962, that Matthews gave you a half ounce of heroin on consignment?

MR. SHORTER: Your Honor, may the record show I have a standing objection to any reference to my client, Mr. Matthews, in these questions Mr. Smithson is putting?

THE COURT: Yes, you may have a standing objection.

MR. SHORTER: And may I also, so that I won't unnecessarily interfere again, have a standing objection, because I anticipate this will be so, and since I am here for Mr. Mitchell, representing his two clients, may I have an objection on their behalf also?

THE COURT: You may.

MR. JOHNSON: And, if Your Honor please, so that I may not interrupt, may I have an objection to this? There has been no disposition of this defendant to deny that that statement was agreed to by her and there has been no suggestion that she did not sign it as a result of the talks she had. There is no issue as to whether she signed it. It is improper cross-examination and does not impeach her testimony in one whit.

THE COURT: The objection that you made, Mr. Johnson, is overruled.

1772.

BY MR. SMITHSON:

Q. Did you not tell, on March 8, 1962, Agents Reed and Heneghan, that about the 8th or 9th of January, 1962, that Matthews gave you a half ounce of heroin on consignment? A. I said that, sir.

Q. You told them that on that night? A. Yes.

Q. Did you also tell them that you could test by the reaction and knew that it was heroin? A. No, I never told them that.

Q. You did not tell them that? A. No.

Q. Did you tell them that in all your dealings with him you had never known him to give you any heroin that didn't test out right? A. No.

Q. And that wasn't told by you to these agents? A. It wasn't.

Q. You signed this statement, and corrected it, didn't you? A. I didn't correct anything, sir. I initialed some typographical errors.

1773 Q. Do you recall, and did you tell the agents, "I don't recall the date but not long after this, it was the first time I met Ricky, I gave Ricky four capsules of heroin from each of two half ounces of heroin I received from Matthews on this same day"? A. I told them that I -- I didn't say who I got the drugs from, sir, but I did give eight capsules of heroin to Ricky. In fact, I gave them to Joseph Jackson and he gave them to Ricky, on that first date.

Q. Did you not tell the agents that you gave them to Ricky? A. No, I did not.

Q. From two half ounces of heroin you got from Matthews? A. No, I did not.

Q. Then, it is your statement that the agents put this in there? A. I told them that I gave Joseph Jackson eight capsules of heroin which he gave Ricky along with his car keys. I said that.

Q. That isn't what I put to you in this statement as a question. A. That is true.

Q. "Not long after this, I don't remember the date, it was the first time I met Ricky, I gave Ricky four capsules of heroin from each of two half ounces of heroin I had received from Matthews on the same date."

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Did you or did you not tell the agents that? A. I did not say that.

Q. Did you also tell the agents that one of the half ounce packages had heroin of a brownish color and that Matthews told you to try it and see what it was like? A. I did not say that, sir.

Q. And at the same time that Matthews gave you these two half-ounce packages you gave him \$125? A. No.

Q. You didn't say that? A. No, I did not.

Q. You didn't tell the agents that? A. I did not.

Q. You didn't tell them the money was to pay for the initial half ounce of heroin you had received from Matthews on consignment? A. I did not.

Q. To your recollection, did you tell them these first two deliveries were made to you by Matthews at the Diner at 19th and Benning Road, Northeast? A. After they read some papers to me I agreed that I got it from Matthews.

1775 Q. Did you tell them this: That your recollection is that the first two deliveries were made to you by Matthews at the Diner located at 19th Street and Benning Road, Northeast?

Did you or did you not tell them that?

MR. JOHNSON: I object to that. She has answered the question already.

MR. SMITHSON: May I have the answer of the witness, Your Honor?

THE COURT: Yes.

THE WITNESS: I can't answer yes, or no, the way you are phrasing those questions to me. I can't answer yes, or no.

BY MR. SMITHSON:

Q. (Showing paper to witness.)

Is this your signature? A. Yes, it is.

Q. Your signature with the date 3-8-62, beside it? A. It is my signature, sir.

Q. With the date 3-8-62 beside it? A. There is a date beside it.

Q. It is 3-8-62, isn't it? You read it, didn't you? A. That's what I read.

MR. SHORTER: Your Honor, may the record be clear as to what she is supposed to have read? Is he referring to the statement or is he referring to her signature?

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MR. SMITHSON: Counsel is correct. I am referring to the signature on Exhibit 15 of the defendant Doris L. Gardiner with the date 3-8-62.

MR. SHORTER: And not the statement?

MR. SMITHSON: Not yet, sir.

BY MR. SMITHSON:

Q. Did you later in this same conversation with the agents tell them that during the next two weeks you would get a half ounce of heroin at a time from Matthews and this was usually three times a week? A. I did not.

Q. Did you tell the agents you would get in touch with Matthews between 8:30 and 9:00 a.m., in the morning? A. No.

Q. Did you tell them you would call him at Ludlow 1-8460 -- LU-1-8460? A. I never gave them any telephone number.

Q. Did you identify it as the telephone number at his home? A. I did not know where he lived.

Q. Did you identify it as the telephone number at his home? A. I did not know where he lived.

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Q. Did you identify it as the telephone number? Yes, or no? A. No.

Q. Did you tell them that if you could not get Matthews at this number you would then call him at Ellen Phelps' telephone number which is LI 3-4168? A. No.

Q. Did you tell them that these deliveries were made either by Matthews or Phelps and the delivery would take place at the Diner, at the store where you worked, or at 19th and Maryland Avenue, Northeast? A. No.

Q. Did you tell them that you next sold heroin to Ricky at the Supermarket and on this occasion you sold him an ounce of heroin? A. I gave him an ounce of heroin.

Q. You sold him an ounce of heroin? A. I gave him an ounce of heroin.

Q. Did you get money for it? A. Yes, he gave me money before I gave it to him. He gave me money and I gave him the heroin.

Q. So you sold him the heroin for the money? A. Yes.

1778 Q. Tell me: On these transactions you were also getting heroin for yourself to sell; is that true? A. It is not true.

Q. I put it to you, Mrs. Gardiner, that you told the Grand Jury you got narcotics for yourself to sell.

MR. JOHNSON: I object, if Your Honor please. He is injecting himself in this now and I think if Mr. Smithson is going to talk about the Grand Jury minutes we ought to have a hearing and ought to bring in Mr. Smithson and have him testify about it and how that girl came to go before the Grand Jury, under oath.

THE COURT: All of that will be stricken. The jury will disregard the statement.

MR. SMITHSON: May the question stand and may I have an answer, please, Your Honor?

THE COURT: Yes.

Do you want to say something, Mr. Shorter?

MR. SHORTER: No, thank you, Your Honor.

THE COURT: Well, you were standing and I thought you wanted to say something.

Read the question to the witness. Listen to the question and then answer.

(Thereupon, the reporter read the last question propounded to the witness as follows:

"Question. I put it to you, Mrs. Gardiner, that you told the Grand Jury you got narcotics for yourself to sell.")

1779 THE COURT" I think you should put the question: Did she?

MR. SMITHSON: I agree, Your Honor.

BY MR. SMITHSON:

Q. Did you tell the Grand Jury that? A. I think it was the

Foreman of the Grand Jury room read from the statement as you are reading it now and asked the questions somewhat like you are now and I said yes to everything on the paper.

Q. Just yes. Is that what your testimony is? A. No. Some things I had to go in further detail.

Q. Now, for the present moment --

MR. SHORTER: Your Honor, may I make this suggestion: If Mr. Smithson proposes to question and interrogate this witness on cross-examination on something she said before the Grand Jury, her counsel ought to have a copy of what she is supposed to have said.

MR. SMITHSON: Not at this time it isn't, Your Honor. This has not been offered at any time.

MR. JOHNSON: If Your Honor please, I don't know how he can cross-examine --

THE COURT: If the witness said she said the thing --

MR. JOHNSON: Ma'am?

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THE COURT: If the witness said she said it, then that is one thing. If she said she didn't, that's another.

MR. JOHNSON: If Your Honor please, as I understand it, this is beyond direct, of course. There was nothing mentioned about the Grand Jury testimony.

THE COURT: You asked her a good many questions, Mr. Johnson, and these questions are pertinent to what you asked on the general subject of whether she had or had not sold certain things.

MR. JOHNSON: Very well, if Your Honor please. If that is Your Honor's ruling. I object.

BY MR. SMITHSON:

Q. Now, it wasn't the foreman.

Or, I will put it to you this way: Was it not an Assistant United States Attorney by the name of Stevas who questioned you before the Grand Jury? A. I don't know his name.

Q. A fellow about five foot seven or eight and about 175 pounds?
A. He was sitting down at the corner of the desk.

Q. You were sworn and you did take an oath before that Grand

Jury, didn't you? A. Yes, I did.

1781 Q. Mrs. Gardiner, were you not asked these questions and did you not give these answers with regard to this statement:

"Originally Ricky had told you he wanted a full ounce; isn't that right?"

And did you not answer, "Yes"? A. Yes.

Q. And were you not asked this question:

"When he paid you for the full ounce and you gave half of it back saying you understood he only wanted a half an ounce, " did you say, "Yes"? A. Yes.

Q. Were you then asked the question:

"Is that because you wanted to keep a half ounce for yourself or for some other customer?"

"It was for myself."

Did you make that answer? A. Before I answer that question -- I have to say this before I can answer.

MR. SMITHSON: I object to any statement from the witness. I have asked the witness' recollection of the question.

1782 MR. JOHNSON: If Your Honor please, I suggest she is entitled to answer the question in whichever way she sees fit. Your Honor is to rule on the responsiveness of it.

THE COURT: Let's see what the question is.

Read the question, Mr. Reporter.

You are to wait. You are not to answer until I tell you whether you are or are not to answer.

(Thereupon, the reporter read the last question propounded to the witness as follows:

"Question. Were you then asked the question: 'Is that because you wanted to keep a half ounce for yourself or for some other customer?'"

"'It was for myself.'

"Did you make that answer?")

THE WITNESS: I cannot answer --

THE COURT: (Interposing) Wait a minute.

MR. SMITHSON: I think the question calls for a responsive answer. Did she give that answer to the question?

MR. JOHNSON: If Your Honor please, --

THE COURT: You may answer yes, or no.

THE WITNESS: I can't very well answer yes, or no to any of those questions he is going to ask me.

THE COURT: If you say you don't remember, then you don't remember.

THE WITNESS: I don't remember.

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THE COURT: Very well.

BY MR. SMITHSON:

Q. Let me ask you this: Were you not asked this:

"So Henry gave you the full amount, a half ounce in each bag, is that right?"

And did you not answer, "Yes"?

MR. SHORTER: I object to that.

THE WITNESS: I can't answer those questions he is putting.

THE COURT: Come to the bench.

(AT THE BENCH:)

MR. SHORTER: Your Honor, he is asking questions that implicate and involve other defendants for the purpose of determining the truthfulness of the witness. I don't think that is fair. I think Your Honor should not let him abuse the rights of these other people.

THE COURT: I think it ought to be clear what statement it is you are seeking to impeach.

MR. SMITHSON: Your Honor, I will do that.

THE COURT: I think in the examination that should be done. Sometimes it is a little difficult.

MR. SMITHSON: All right.

THE COURT: I think her attention should be called to what you claim she said and then ask her.

1784

MR. SMITHSON: I will be glad to.

(IN OPEN COURT:)

MR. SMITHSON: May I have this marked for identification as Government's Exhibit 16, Your Honor?

THE COURT: Very well, for identification.

THE DEPUTY CLERK: Government's Exhibit 16 marked for identification.

(Thereupon, Statement of Doris L. Gardiner, was marked Government's Exhibit No. 16 for identification.)

(Mr. Smithson handed the document to Mr. Johnson.

There was a pause while Mr. Johnson looked at the document.)

THE COURT: I would like to see counsel at the bench.

(AT THE BENCH:)

THE COURT: Mr. Smithson, I have sort of a faint recollection of a criminal case that involved a fellow named Young and he was examined about something he said before the Grand Jury and the Court of Appeals reversed because they felt that some particular rule was not followed.

MR. SMITHSON: Your Honor has reference to whether or not a defendant -- the witness was advised he did not have to testify. Your Honor may recall Mr. Johnson made his announcement at the start of the trial. I identified Mr. Stevas and Mr. Del Porto. He is the court reporter
1785 who was present.

I would like to put this in the record. Mr. Stevas called Doris Gardiner. She was called and the witness was sworn.

"By Mr. Stevas: Would you give us your name?

"Answer. Doris Louise Gardiner.

"Question. Doris, I have here the original of a statement consisting of five pages and part of a sixth page bearing the signature Doris L. Gardiner. Is that your signature there? (Indicating)

"Answer. Yes, it is.

"Question. And the initials on each of these other pages, D.L.G., and did you write those on there?

"Answer. Yes, I did.

"Question. Did you read this statement before you signed it?

"Answer. Yes.

"Question. Have you read it this morning yet?

"Answer. No.

"Question. Did you dictate it to someone who was typing? How did it get written up?

"Answer. Questions were asked.

"Question. I see. Did you have a chance to read it before you signed it?

1786

"Answer. Yes.

"Question. Did you put the initials on page 4 showing some corrections had been made?

"Answer. Yes.

"Question. Did anyone promise you anything to get this statement from you?

"Answer. No.

"Question. Has any one threatened you into making this statement?

"Answer. (Shakes head.)

"Question. You are presently in D. C. Jail?

"Answer. (Nods head.)

"Question. Is that in connection with being arrested by the Narcotics Bureau?

"Answer. Yes.

"Question. Are you pending trial at this time?

"Answer. (Nods head.) Yes.

"Question. Is anyone forcing you to come before this Grand Jury this morning to testify?

"Answer. (Shakes head.)

"Question. Do you know where you are today?

"Answer. Yes.

"Question. You understand you have a perfect right to

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get up from that chair and leave this room without testifying to a thing?

"Answer. Yes.

"Question. Is it your desire to testify?

"Answer. Yes, it is.

"Question. Do you understand that any testimony that you give here may incriminate you and can be used against you?

"Answer. Yes.

"Question. Do you understand that under the Constitution of the United States no one can compel you to give testimony against yourself?

"Answer. Yes.

"Question. Notwithstanding that right, you desire to testify here today?

"Answer. Yes.

"Question. You realize that whatever you say here today can be used against you either at the Grand Jury level or, if there should be an indictment, at your trial?

"Answer. Yes.

"Question. What I have just explained to you is this waiver of your constitutional right, and I will ask you to sign this, then, if you wish to testify?

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"Answer. (Witness signs.)

"Question. Thank you. Just have a seat.

Keep your original statement now, Doris, I have a copy of the statement that you have in your hand and this represents your testimony what you know about this matter?

"Answer. Yes".

I think it is wholly admissible.

THE COURT: It seems to me she is here and she has been on direct examination and now you are on cross-examination. Her testimony is what she is saying here today.

MR. JOHNSON: That's right.

THE COURT: The only purpose it seems to me that you can use this for is the usual contradiction, to show she made contradictory statements.

MR. SMITHSON: And the fact that she was under oath then, too.

THE COURT: You are not entitled to take this paper and read verbatim.

MR. SMITHSON: No. I have to ask questions.

THE COURT: That is the reason why I have been asking you to come to the bench.

1789 I want to make it clear that anything you ask her about this Grand Jury matter should be related to some issue that has been brought out by her direct examination.

MR. SMITHSON: This last related to the fact that she had not gone back into it and did not desire to go back into it before Jose and Ricky importuned her.

MR. JOHNSON: This statement verifies what she says.

THE COURT: This paper has been identified as Government's Exhibit 16 for identification.

MR. JOHNSON: That's right.

THE COURT: It is not in evidence and she has not been questioned concerning the contents of this paper.

MR. JOHNSON: No, ma'am.

MR. SMITHSON: That's right.

MR. JOHNSON: And I haven't asked her anything about it.

MR. SMITHSON: Your Honor asked me which statement was used for the purpose of the questions I intended to ask. That is all I intend to use.

THE COURT: He is not going to use this paper.

MR. SMITHSON: No. I have no intention at the present time. I can't say flatly that some circumstances could not arise, but I do not envision using it at this time.

MR. JOHNSON: You might state your purpose for using the Grand Jury minutes --

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THE COURT: He proposes to contradict that she had not been in the narcotics business; where she made contradictory statements.

MR. JOHNSON: He has in his possession her statement where she said she was not in the narcotic business before January 10. This is in confirmation of the fact she wasn't.

THE COURT: It isn't in evidence.

MR. JOHNSON: I understand, but he said this girl testified, He asked her questions from this paper, Exhibit 16.

Mr. Smithson said this witness testified already that Mr. Stevas, in the Grand Jury room, had this paper from which he read and asked questions and she stated that. He now says he is going to use her testimony before the Grand Jury to impeach what she said here. That is what he told Your Honor, from my understanding.

MR. SMITHSON: No.

THE COURT: No. If I understand what he is trying to do, she testified to particular things here, as a witness on the stand, just as you contradict any witness by showing on other occasions they made a statement which contradicts what they said on the stand, and he proposes to do it. Is that it?

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MR. SMITHSON: Yes.

MR. JOHNSON: As I understand it, my witness said she agreed to everything these people said. She agrees she made the testimony. Nobody has asked whether it was true or not.

THE COURT: Those are generalities.

MR. JOHNSON: Mr. Smithson is adding about three more days to this trial. If he wants to go into it, it is all right with me.

MR. SMITHSON: I am not sure if there is a pending question.

(IN OPEN COURT:)

THE COURT: Mr. Reporter, read the last question, please.

(Thereupon, the reporter read the last question propounded to the witness as follows:

"Let me ask you this: Were you not asked this: 'So Henry gave you the full amount, a half ounce in each bag, is that right?'

"And did you not answer, 'Yes'?"

THE COURT: Just a minute. Why are you asking this question? What has she said?

1792 MR. SMITHSON: Let me get back to the report, Your Honor.
(There was a pause.)

MR. SMITHSON: Indulge me for a moment, Your Honor. I have a particular point here.

THE COURT: Very well.

We will take our luncheon recess at this time. The luncheon recess will be until 1:30.

Members of the jury, keep in mind the usual admonition.

(Thereupon, at 12:15 o'clock p.m., the luncheon recess was had.)

1793

AFTERNOON SESSION

(Out of Presence of Jury)

MR. SMITHSON: Your Honor, the Court placed a question to me at the close with regard to a case and cited the Young case, Hirschel Young, which is the decision of April 8, 1954, Number 11825.

THE COURT: I found it.

MR. SMITHSON: I submit it is not applicable, Your Honor.

THE COURT: I looked at it but I was looking at some other cases too.

You are trying to use this for impeachment purposes?

MR. SMITHSON: Impeachment, credibility.

May I say something?

THE COURT: Yes; go ahead.

MR. SMITHSON: I would ask Your Honor to look at a case in the Court of Appeals. Actually the decision which I believe Your Honor would find most helpful is United States against Johnson in 76 F. Supp. 542 at page 548, which was affirmed at 165 Fed. 2d --

THE COURT: You are going too fast for me.

MR. SMITHSON: I beg your pardon.

THE COURT: What was the Federal Supplement?

MR. SMITHSON: 76 Federal Supplement 542.

1794 THE COURT: And you say it was affirmed in one hundred seventy what?

1795 MR. SMITHSON: 165 Fed. 2d, and the portion that I have in reference in the Fed. 2d is on page 48.

THE COURT: Would you get me 165 Fed. 2d?

(The Deputy Marshal complied.)

MR. SMITHSON: In this regard, Your Honor, this is the portion. The point was raised as to the defendants Greenes and Memolo in that case, and the Grand Jury testimony given by them respectively was recited by the official reporter to the jury in the case, and it was contended:

"There is no authority for the use of such testimony in the case of the prosecution in chief, but that of the United States would be confined to the use of such testimony for impeachment of the particular defendant as a witness. The court by positive instructions prevented the use of this testimony as against any of the other defendants and therefore none are involved in consideration of this question except the defendants who gave the testimony themselves. The Government is always entitled to prove what the defendant said about the acts charged in the indictment. The expressions of a defendant may be denials of guilt. They may contain hearsay. They are admitted for the purpose of showing his state of mind with reference to the acts done. The Government has never been denied the right to use a confession of a defendant in chief provided it was voluntarily made. Proof of ordinary admissions can be made without preliminary foundation as to voluntariness even when produced in chief. The evidence of the admissions before the Grand Jury of one of these defendants should not be excluded simply because they were made before an official body. Even though the testimony is construed as a confession it should not be excluded from the Government's case in chief. The rule as to admissions and confessions made elsewhere certainly should control here. The testimony was adduced before the Grand Jury in response to lawful process; namely, a subpoena. The record shows the defendant was specifically warned of his right against self-incrimination. The secrecy of the Grand Jury in-

vestigation should be no bar. All of the precautions which are often lacking in extrajudicial admissions of confessions were here taken, therefore the Government had a right to bring out the relation of the testimony of each of these defendants as against him alone on the grounds it contained admissions against interest."

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Obviously, Your Honor, the Court of Appeals affirmed that. If I could have used this as a part of my case in chief, it is obviously proper under the weight and the limited purpose for which I am using it.

THE COURT: Now, of course, what you read, that deals with it in other ways, but now you are attempting to use it to impeach or contradict a witness.

MR. SMITHSON: That is correct, Your Honor.

THE COURT: So since you are, I think it ought to be in your questioning of her, I think it ought to be clear what it is she has testified to that you are seeking to impeach.

MR. SMITHSON: I propose then to modify these questions by putting a preliminary question each time, if I may?

THE COURT: Yes; and then I think when you give what she is supposed to have said, you ought to give it as nearly as possible in the language that she used.

MR. SMITHSON: Sometimes these questions run two and three together before you get it, Your Honor. I will, nevertheless, do that.

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MR. SHORTER: Your Honor, could I just ask that the Court include in its directions to Mr. Smithson that as far as possible he avoid trying to impeach this witness with respect to things she might have said about other defendants when it's clear that what she said about the other defendants were not admitted for the truth of what she said, and to try to impeach her respecting the truth of this, I think, doesn't accomplish -- isn't for the proper purpose.

THE COURT: Well, Mr. Shorter, the trouble about that is it would just take somebody, a mental gymnast, to try to convey to the witness, and for Mr. Smithson to try to identify these things with covering up what she is supposed to have said about it.

MR. SHORTER: Well, the only thing is, we had the question

before as to whether or not she said that Henry gave her something. Now, that isn't in any way related to anything she said on direct examination. As I understand it, she is trying to establish that she was entrapped and that she further did not voluntarily make this statement. What difference does it make as to whether or not she said Henry gave her something for those purposes? I mean, that's what I'm trying to point out. I mean, that obviously has nothing to do with any proper cross-examination purpose.

THE COURT: Do you know what he is talking about, about Henry?

MR. SHORTER: That is the pending question.

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MR. SMITHSON: Your Honor will recall that you asked me when the jury was here and I frankly stated because of the discussion at the bench I didn't remember the predicate. The predicate that I put to the witness for the last question was: "Did you not and have you not bought narcotics for others than this particular Ricky, in fact for yourself?" She said, "No." I asked her: "Were you not asked this question: 'So Henry gave you the full amount, a half ounce in each bag?' and did you not answer 'Yes.'?" The previous question to that had been that there had been a purchase of an ounce that she wanted an ounce for herself.

If Your Honor will indulge me, I will show you where that is in the record. I asked her the questions in these fashions.

THE COURT: You said in the record. You are now holding up the Grand Jury record.

MR. SMITHSON: That's right, Your Honor. I should say in the statement which I submit is in the Grand Jury record, or transcript.

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Having laid that basis that she had bought narcotics for others, I asked her: "Now originally Ricky had told you he wanted a full ounce, isn't that right?" and the answer "Yes". The other question would be: did she not tell the Grand Jury -- was she not asked this question before the Grand Jury and did she not make this answer. Then was she not asked the question: "When he paid you for the full ounce you gave him half of it back saying 'You understand he only wanted a half ounce,' and did you not answer yes?" And question: "Is that because you wanted to keep a half ounce for yourself or for some other customer?" Answer: "It was for myself." Question: "For your-

self?" Answer: "Yes." Question: "So Henry gave you the full amount, a half ounce in each bag, isn't that right?" That is the pending question.

MR. SHORTER: What has that got to do with whether or not she wanted a half ounce herself? She said she got an ounce, Your Honor, if I understand Mr. Smithson correctly. What difference does it make whether ---

THE COURT: Why do you need this last question?

MR. SMITHSON: It goes to the question, Your Honor, whether or not she bought it for others than Ricky or Joe Jackson. She said she only went into this business for Joe Jackson or Ricky. She said in this particular instance she bought it for herself. In another one which I will read at the appropriate time I will show you where she said she bought it for another customer.

MR. SHORTER: What difference does it make where she got it?

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MR. SMITHSON: I think it goes to a great extent to the question of entrapment, Your Honor.

MR. SHORTER: What difference does it make where she got it? She could have had a pound.

THE COURT: Mr. Shorter, as I said before, I do not think he can even question her about what is in there unless he tells her what she is supposed to have said. Suppose he said, didn't you say to so and so, and uses some other name? She certainly would have the right to say no.

MR. SHORTER: She hasn't denied any of the questions that have been put to her as far as I can remember.

MR. SMITHSON: Oh, yes, Your Honor.

MR. SHORTER: About this transaction?

MR. JOHNSON: If Your Honor please, I think what the -- may I say this; maybe this will clarify it.

THE COURT: You might just as well not be talking because you are talking low, you have your hand to your face, and you are not facing me.

MR. JOHNSON: Yes, ma'am.

THE COURT: Now I will hear you.

MR. JOHNSON: I think it proper that Mr. Smithson may use any sworn statement that she has to impeach her testimony in direct, but I don't think Mr. Smithson can do this -- go outside of the direct; ask her a question disconnected with the direct and then bring in the Grand Jury thing to impeach her on a question that he elicited from her. Now I think he's properly -- he's well within his rights -- I think the case holds that -- that in any testimony she uttered from that stand if he wants to show this jury that she has misstated something on the stand, that he can then use the Grand Jury statement to impeach her.

THE COURT: That is exactly what he is planning to do, as I understood his statement to me.

MR. JOHNSON: Well now, with that understanding -- is that what you are going to do, Mr. Smithson? Do I understand you clearly, is that right, sir?

MR. SMITHSON: I will answer the questions of the Court.

MR. JOHNSON: Well, as I understand it, whatever questions he asks her, that he's going to show in her testimony in direct that she made a statement and then he's going to impeach her. I guess it's all right, but if it is not that, what he's trying to do, I think, is something else. He is trying to ask her a question on cross about something she did not testify to on direct and then bring in something out of the Grand Jury to impeach her with; in other words ---

1802 THE COURT: Mr. Johnson, a lot that she said was in general terms.

MR. JOHNSON: I agree with Your Honor.

THE COURT: Sometimes it takes something specific to contradict something that is said in general terms.

MR. JOHNSON: If Your Honor please, the only thing that I testified to, I think she testified about that statement, was the manner in which it was obtained. She testified as to the nature of the questioning.

THE COURT: Yes, but she has testified to a lot of things beside that.

MR. JOHNSON: Oh, yes, she did, Your Honor is right, and I

think with reference to anything she testified to that he can impeach her, but I don't think he can set up something to impeach her with.

THE COURT: The difficulty is that you don't always think. You do not always have a view of what she said that somebody else has.

MR. JOHNSON: Well I agree with Your Honor about that too. I think it may be subject to several interpretations, but by and large, if Your Honor please, all I wanted to understand is that is what is going to happen, and Mr. Smithson hasn't committed himself; he's merely said that. The example that he just cited is not that, however.

1803. THE COURT: Bring the jury in, please.

(The jury entered the jury box.)

Let the record show Mr. Curtis Mitchell is here.

(The witness, Doris Gardiner resumed the stand.)

CROSS-EXAMINATION - (Continued).

BY MR. SMITHSON:

Q. Mrs. Gardiner, you told us that Matthews did not give you any drugs on consignment in December of 1961? A. I did.

Q. And you told us that you did not tell the agents that when the Exhibit 15 was given to you on the 8th of March for signature? A. I said I agreed with the agents on different sales that I was charged with.

Q. Let me ask you this, then: you say that you did not tell them that Matthews gave you this narcotics on consignment? A. I still say I agree with the agents.

THE COURT: He did not ask you whether you agreed with the agents. Now the question will be read and answer the question. Don't tell him something else.

Read the question.

(The reporter read the question as follows: "Let me ask you this, then: you say that you did not tell them that Matthews gave you this narcotics on consignment?")

1804 THE WITNESS: I did not.

BY MR. SMITHSON:

Q. Did you not, Mrs. Gardiner, appear before a Grand Jury and

swear and testify under oath having been warned that you did not have to testify on the 19th of March of this year? A. I can't say that I was warned not to testify, Mr. Smithson. I was instructed as to what to say.

Q. Were you advised that you did not have to testify? A. By whom?

Q. Were you advised that you did not have to testify by a person in the Grand Jury room when you were called there? A. I had talked to you before I went into the Grand Jury room.

THE COURT: Now -- just a minute.

THE WITNESS: I can't answer that question he's asking me.

THE COURT: Yes, you can answer the question.

Put the question again.

BY MR. SMITHSON:

Q. Were you not advised when you went before the Grand Jury on 1805 19 March 1962 by one of the individuals therein -- were you not advised that you did not have to testify in that Grand Jury? A. I cannot answer that question truthfully.

MR. JOHNSON: Just a minute, just a second.

I object to the question, if Your Honor please. It wasn't covered by the direct.

THE COURT: The objection is overruled.

BY MR. SMITHSON:

Q. Did I understand you to say you couldn't answer it truthfully? A. No; I cannot.

THE COURT: Do you mean to tell us that you do not recall whether or not somebody in the Grand Jury room told you that you did not have to testify if you didn't want to?

THE WITNESS: I know what they told me in the Grand Jury room.

THE COURT: Well then, do you know whether they told you that or not?

THE WITNESS: Yes, they told me that.

THE COURT: Well, that is all he was asking you.

BY MR. SMITHSON:

Q. Tell me, at that time were you shown a statement at the time

you were advised of this? A. I was shown nothing.

1806 Q. You were shown nothing?

Specifically were you shown Government Exhibit 16, for identification, at the time you were advised of your rights before the Grand Jury on the 19th of March? A. I was shown nothing.

Q. You were shown nothing?

THE COURT: I did not get her answer. Would you read the answer, please.

(The reporter read the witness' answer.)

BY MR. SMITHSON:

Q. I will ask you, were you not asked at that time the following questions and did you not make the following answers:

"Doris, I have here the original of a statement consisting of five pages and part of a sixth page bearing the signature Doris L. Gardiner. Is that your signature there (indicating)."

And your answer was: "Yes, it is." A. Yes.

Q. And it is your testimony now -- strike that.

Is it your testimony you were shown something then? A. He read from this statement the same words you are reading to me now.

1807 Q. Were you asked whether or not you read that statement? A. I think I was.

Q. And what was your reply? A. Yes.

Q. Did you read the statement? A. I did not.

Q. Doris, you were under oath at that time? A. Yes; I was.

Q. Were you asked how the statement was prepared, Doris? A. I don't remember that.

Q. Were you asked the question: "Did you dictate it as someone was typing? How did it get written up?" And did you answer: "Questions were asked."? A. Repeat that, sir.

Q. Were you asked the question: "Did you dictate it as someone was typing? How did it get written up?" and did you answer: "Questions were asked."? A. I don't remember that.

swear and testify under oath having been warned that you did not have to testify on the 19th of March of this year? A. I can't say that I was warned not to testify, Mr. Smithson. I was instructed as to what to say.

Q. Were you advised that you did not have to testify? A. By whom?

Q. Were you advised that you did not have to testify by a person in the Grand Jury room when you were called there? A. I had talked to you before I went into the Grand Jury room.

THE COURT: Now -- just a minute.

THE WITNESS: I can't answer that question he's asking me.

THE COURT: Yes, you can answer the question.

Put the question again.

BY MR. SMITHSON:

Q. Were you not advised when you went before the Grand Jury on 1805 19 March 1962 by one of the individuals therein -- were you not advised that you did not have to testify in that Grand Jury? A. I cannot answer that question truthfully.

MR. JOHNSON: Just a minute, just a second.

I object to the question, if Your Honor please. It wasn't covered by the direct.

THE COURT: The objection is overruled.

BY MR. SMITHSON:

Q. Did I understand you to say you couldn't answer it truthfully? A. No; I cannot.

THE COURT: Do you mean to tell us that you do not recall whether or not somebody in the Grand Jury room told you that you did not have to testify if you didn't want to?

THE WITNESS: I know what they told me in the Grand Jury room.

THE COURT: Well then, do you know whether they told you that or not?

THE WITNESS: Yes, they told me that.

THE COURT: Well, that is all he was asking you.

BY MR. SMITHSON:

Q. Tell me, at that time were you shown a statement at the time

you were advised of this? A. I was shown nothing.

1806 Q. You were shown nothing?

Specifically were you shown Government Exhibit 16, for identification, at the time you were advised of your rights before the Grand Jury on the 19th of March? A. I was shown nothing.

Q. You were shown nothing?

THE COURT: I did not get her answer. Would you read the answer, please.

(The reporter read the witness' answer.)

BY MR. SMITHSON:

Q. I will ask you, were you not asked at that time the following questions and did you not make the following answers:

"Doris, I have here the original of a statement consisting of five pages and part of a sixth page bearing the signature Doris L. Gardiner. Is that your signature there (indicating)."

And your answer was: "Yes, it is." A. Yes.

Q. And it is your testimony now -- strike that.

Is it your testimony you were shown something then? A. He read from this statement the same words you are reading to me now.

1807 Q. Were you asked whether or not you read that statement? A. I think I was.

Q. And what was your reply? A. Yes.

Q. Did you read the statement? A. I did not.

Q. Doris, you were under oath at that time? A. Yes; I was.

Q. Were you asked how the statement was prepared, Doris? A. I don't remember that.

Q. Were you asked the question: "Did you dictate it as someone was typing? How did it get written up?" And did you answer: "Questions were asked."? A. Repeat that, sir.

Q. Were you asked the question: "Did you dictate it as someone was typing? How did it get written up?" and did you answer: "Questions were asked."? A. I don't remember that.

1807 Q. Well, now, at the time that you were before the Grand Jury
had you read this statement, Exhibit 16, for identification? A. No.

1808 Q. Were you asked at that time whether or not you had a chance
to read it before you signed it? A. Perhaps I was; I'm not sure.

MR. JOHNSON: If Your Honor please, I move that all this be
stricken. This is Exhibit 16 which Mr. Smithson said to Your Honor he
wasn't going to use except for certain circumstances.

THE COURT: It has not been used. He has merely asked her
questions about it. He has not used the statement. The objection is
overruled.

BY MR. SMITHSON:

Q. Were you asked the question: "Did you have a chance to read
it before you signed it?" and did you answer "Yes."? A. I don't
remember.

Q. Well, do you recall putting initials on this Exhibit 16, for
identification? A. Yes; I did.

Q. And do you recall being asked that question by the Grand Jury?
A. What question?

Q. That you had initialed certain corrections? A. Mr. Smithson,
I don't remember that.

Q. All right. Tell me, you've told us, Mrs. Gardiner, that you
1809 made this statement, Government Exhibit 15, which is in evidence, and
that you signed this statement, whatever it was in, without knowing what
was in it, is that correct, Mrs. Gardiner? A. I didn't say I didn't know
what was in it.

Q. You have told us that the material therein is not true, have
you not? A. I am telling you that the material in there is not altogether
my statements.

MR. SMITHSON: Your Honor, I hate to go over this again, but
when you get an answer somewhat like this I feel forced to ask --

MR. FIRST: Your Honor, he's been over this.

MR. SHORTER: This is exactly what he did the first time he
went through it. I don't see that he has the advantage of repeating and

repeating something that from my point of view and from the point of view of my client is improper. I mean he can't create situations whereby he can continue to do the same thing he has already done.

MR. MITCHELL: And I just arise to make my objection. It was the very same thing that he was accusing Mr. Johnson of doing to which he objected and was sustained.

THE COURT: I do not know what you gentlemen are talking about.

1810 MR. MITCHELL: What he's doing.

THE COURT: Well, what he is doing ---

MR. JOHNSON: If Your Honor please, maybe I can make it clear. Mr. Smithson took that statement early this forenoon, read from it ---

THE COURT: He is not talking now about a statement. I don't understand this last question was about this statement.

MR. JOHNSON: No; he is taking up now again the statement of March. ---

THE COURT: Just a moment. To clarify the atmosphere put your statement, Mr. Smithson, and you wait until I tell you whether you are to answer it or not, please, Mrs. Gardiner.

BY MR. SMITHSON:

Q. Mrs. Gardiner, you said that the information in this Exhibit 15 was not your information altogether, is that your testimony? A. That's my testimony.

Q. I put it to you, Mrs. Gardiner, that the information in Exhibit 15 was entirely what you told the agents? A. That is not true.

Q. Specifically, Mrs. Gardiner, did you tell the agents that you were visited by Matthews in December who inquired how you were doing, that you told him that you needed money; he gave you fifty dollars on this occasion and told you he would let you have some heroin on consignment to get you started in the drug traffic for the purpose of making some money? A. That was not my testimony.

MR. JOHNSON: Just a second.

If Your Honor please, the record will show Mr. Smithson asked that identical question this forenoon. He got the identical answer from

this young lady. Now he's reading a statement that involves every other defendant in here and he's ---

THE COURT: Now, just a minute. I do not want to hear anything more about this matter.

Mr. Shorter.

MR. SHORTER: Your Honor, I would say the same thing Mr. Johnson said, that this is the very thing he did this morning, the very same question.

THE COURT: Mr. Smithson, it seems to me that I do have a recollection of your asking her a similar question this morning.

MR. SMITHSON: Yes, Your Honor.

THE COURT: Is this as introductory to some other question?

MR. SMITHSON: Yes, it is.

1812 THE COURT: The objection is overruled.

MR. SMITHSON: And I believe the answer stands because the witness had answered it she did not.

THE COURT: Read the last question and the last answer, please.
(The last question and answer was read by the reporter.)

BY MR. SMITHSON:

Q. Let me ask you this: did you not tell the Grand Jury that you had begun in the drug traffic prior to meeting the witness Ricky on the 11th of January 1962? A. I cannot answer that.

Q. Did you not tell the Grand Jury that you were introduced or started to sell narcotics again by this person Matthews?

MR. JOHNSON: I object to that, if Your Honor please. That doesn't impeach anything she said on direct examination.

MR. SMITHSON: It certainly does, Your Honor. It goes to the very statement which is in issue here, Exhibit 15.

MR. SHORTER: Your Honor, I would have to object because I don't think a proper predicate has been laid for this question, and I think it's an effort made by Mr. Smithson to lay before this jury through the device of cross-examination, testimony, direct testimony against this defendant which would not be admissible otherwise.

1813 MR. SMITHSON: I cite you the Johnson case that it would be, Your Honor.

MR. SHORTER: Certainly her admission might be used against her, Your Honor.

THE COURT: Put your question.

Read the question. I believe the question is unanswered.

MR. SMITHSON: That is correct, Your Honor.

THE COURT: Read the question, please.

(The reporter read the question as follows: "Did you not tell the Grand Jury that you were introduced or started to sell narcotics again by this person Matthews?")

THE WITNESS: I cannot answer.

THE COURT: The objection is overruled. You may answer. What is your answer?

THE WITNESS: I cannot answer that.

BY MR. SMITHSON:

Q. Do you mean that you did not tell the Grand Jury that, Mrs. Gardiner? Strike that. A. I can't answer that question with a yes or no, Mr. Smithson.

1814 Q. Mrs. Gardiner, were you asked the question at the time: "In other words, Matthews came to the restaurant and started you selling narcotics?" and did you not answer "Yes."? A. I cannot answer yes or no.

Q. And were you not asked as a follow question to that: "After this, this fellow who introduced Ricky to you, this fellow Jackson, came to you and said that he was in trouble?" and you said "Yes."? A. I cannot answer yes or no.

Q. And were you not asked the question: "Did he say what kind of trouble?" A. I cannot answer.

Q. And did you answer "No." A. I cannot answer, sir.

Q. Were you not asked the question: "What did you understand him to mean by being in trouble?" and did you not answer, "He said he wanted some drugs and wanted to get some drugs and needed some money."

MR. JOHNSON: If Your Honor please, this doesn't impeach anything he said on direct examination.

MR. SMITHSON: To quite some extent the Government would submit at the appropriate time to the jury, Your Honor. I don't believe counsel's comments should be made like that.

May it stand, Your Honor.

THE COURT: Yes.

1815

BY MR. SMITHSON:

Q. Can you answer that question, Mrs. Gardiner? A. I cannot answer every question I answered in the Grand Jury room.

THE COURT: Do you mean that you do not know anything that went on in the Grand Jury room?

THE WITNESS: Yes; I do.

MR. JOHNSON: But, Your Honor, can she make an explanation of her answer?

THE COURT: She says she does not know. If she does not know how can she explain it?

MR. JOHNSON: She said she could not answer it. I don't think she said she didn't know. She says she doesn't know what she answered in the -- and since she can't answer that she did that in the Grand Jury room, can she make an explanation?

MR. SMITHSON: I object to counsel getting into this. I am doing the cross-examination.

THE COURT: You will have your opportunity, Mr. Johnson, on redirect examination.

MR. JOHNSON: Very well. May I have a running objection to all these questions.

THE COURT: Yes, you may.

1816

MR. JOHNSON: Thank you.

BY MR. SMITHSON:

Q. Did you not tell the -- strike that.

Were you not, Mrs. Gardiner, selling narcotics during this period of time?

MR. JOHNSON: I object to that, if Your Honor please.

THE COURT: The objection is overruled.

THE WITNESS: I was not selling narcotics.

BY MR. SMITHSON:

Q. Were you not asked, Mrs. Gardiner, if you were selling narcotics and did you not answer that you were assisting in the sale of narcotics for others? A. I cannot answer that.

Q. Were you not, Mrs. Gardiner, asked the question in this fashion, this series of questions? Listen and I will read the questions and answers:

"Question: Since you have gotten out you have not been using it yourself?

"Answer: (Shakes head).

"Question: Except to sell it and make some money?

"Answer: Yes. Actually I was not selling it. Someone else was selling it.

"Question: Well, you were assisting?

1817 "Answer: Yes; I was.

"Question: Were you using some of the money you made out of it to buy clothes?

"Answer: Yes."

Were those questions asked to you and did you give those answers?
A. I cannot answer.

Q. I would like to go back for a minute, Mrs. Gardiner. You have indicated to the ladies and gentlemen of this jury, Mrs. Gardiner, and to the Court, that you made this statement, Exhibit 15, which is this one here. Do you know which one I mean, Mrs. Gardiner? A. I made that statement ---

MR. JOHNSON: Just a second, Mrs. Gardiner. I object to the remark. There has been no statement that she made that statement, no testimony.

MR. SMITHSON: I don't believe I said it that way, but if I did I will rephrase it.

MR. JOHNSON: Yes, sir.

BY MR. SMITHSON:

Q. Your testimony is that such statement as you signed, whatever it was, was made after certain promises were made to you, is that correct? A. Yes, Mr. Smithson.

1819 Q. And that those promises were made to you before you went to the Grand Jury, Mrs. Gardiner? A. Part of them were.

Q. Did you not say on your direct examination that you had spoken to agents Heneghan and Reed and to myself before you went to the Grand Jury on the 19th of March and told those individuals and me that you would not testify because certain things had not been done for you and that you were promised they would be done? A. I told you that, Mr. Smithson.

Q. Mrs. Gardiner, were you asked by the Grand Jury if anyone had promised you anything? A. Yes; I was.

Q. And what was your answer? A. My answer was no.

Q. This is the same Grand Jury session when you were still under oath, Mrs. Gardiner? A. Yes; it was.

Q. Are you telling us, Mrs. Gardiner, you were forced to testify? A. I wasn't forced. I knew that when I got to the Grand Jury room I was to cooperate with the agents and you said to do.

1820 Q. Well now, you wanted to testify? A. I wanted help.

Q. Did you want to testify. A. I did not.

Q. You did not?

It wasn't your desire to testify? A. It was not.

Q. Well, Mrs. Gardiner, you were asked that by the Grand Jury, weren't you? A. I wanted help, Mr. Smithson.

Q. Mrs. Gardiner, you were asked whether or not it was your desire to testify, were you not? A. Yes; I was.

Q. And what was your answer? A. My answer was no.

Q. Mrs. Gardiner, were you asked the question: "Is it your desire to testify?" and did you answer, "Yes, it is."? A. Yes; I said that.

Q. Now, Mrs. Gardiner, you've asserted that on an occasion, and you say I spoke with you on the 15th of March, that I made certain statements to you -- is that correct? A. Yes; it is.

Q. Let me ask you, Mrs. Gardiner, at the time on the 15th of March, 1962, you had already given a statement which is Government Exhibit 15 and signed it on the 8th of March, 1962, isn't that correct?

A. I have given no statements, Mr. Smithson.

Q. Now at the time that you did speak with me on that morning, I will ask you, Mrs. Gardiner, if that wasn't in the presence of the agents Heneghan and Reed? A. Yes.

Q. Mrs. Gardiner, did I at that time advise you, or didn't I advise you at that time that you didn't have to talk to me and answer a single question of mine? A. Yes.

Q. Mrs. Gardiner, at that time didn't I tell you that you should have an attorney before you talked to me or made any statement further in this case? A. I don't know at that time that you told me I should have an attorney. I'm not sure whether it was before we talked or after.

Q. Would you deny it was before, Mrs. Gardiner? A. I don't know, sir.

Q. Mrs. Gardiner, at that time were you not asked by me if you had funds to employ your own attorney? A. Yes; I was asked that by you.

Q. Did you not reply, Mrs. Gardiner, that you did not? A. I said that.

1821 Q. And were you not at that time told by me, Mrs. Gardiner, that before you made any further statement in this particular case I felt you should have the advice of counsel? A. Yes.

Q. At that time, Mrs. Gardiner, did I not ask you if you knew a Mr. William Tinney? A. You asked me that morning; yes.

Q. Did I not tell you at that time, Mrs. Gardiner, that you didn't have to talk to Mr. Tinney, you could have your own attorney, and if you didn't have one would you object to speaking to Mr. Tinney for such advice as he might give you? A. Yes.

Q. I believe at that time I also told you, Mrs. Gardiner, that you would have to make your own arrangements with Mr. Tinney, didn't I.

A. Say that again.

Q. Didn't I tell you whatever arrangements that would have to be made between the two of you for him to represent you, you would have to make with him? A. Whatever arrangements?

Q. That's right, fee or what have you. A. Fee?

Q. Yes. A. We didn't speak about any fees.

1822 Q. I am not speaking, saying about what you spoke to Mr. Tinney. I don't mean to put that question to you. That's between you and Mr. Tinney.

Did I not tell you you would have to make your own arrangements having to do with fees with Mr. Tinney? A. No; you did not.

Q. You deny that?

Now, Mrs. Gardiner, did you not say at that time that you would like to speak to Mr. Tinney before a further statement was taken? A. Yes.

Q. Were you not told by me, Mrs. Gardiner, at that time that I could do nothing about your back-up time and that I could do nothing about dismissing the charges against you? A. You told me -- No; you didn't say that.

Q. You say I didn't.

Now, Mrs. Gardiner, you have led us to believe, the jury and the Court, that it was your belief that the charges would be dismissed against you?

MR. JOHNSON: I object to that, Your Honor, he led anybody to believe. She testified to that.

MR. SMITHSON: I will rephrase the question.

1823 BY MR. SMITHSON:

Q. It is your testimony, madam, that you were led to believe by me and others that all of the charges would be dismissed against you?

A. All except my good time.

Q. I see, and you say that this was told to you on the morning of

the 15th of March, is that correct? A. Yes.

Q. Yet you know that you were asked whether any promises had been made to you before the Grand Jury to which you answered no on the 19th of March? A. Yes; I do.

Q. Then, Mrs. Gardiner, were you advised before that Grand Jury that your testimony would be and could be used against you in your trial? A. I was told that.

Q. And what was your answer? A. My answer was yes.

Q. Now, as I understand your testimony, Mrs. Gardiner, there was only one occasion when Joseph Jackson spoke to you about the purchase of these narcotics on the 11th of January, is that correct?

MR. JOHNSON: I object to that. Now, if Your Honor please, I don't think that's a fair statement of her testimony.

1824 THE COURT: I suggest that you rephrase your question.

MR. SMITHSON: All right.

BY MR. SMITHSON:

Q. Is it your testimony that Joseph Jackson spoke to you more than once on the 11th of January 1962 relative to narcotics? A. Yes.

Q. On that date? A. No.

Q. Well, Mrs. Gardiner, on the date of the 11th of January were you capping narcotics when Agent Broadnax came in there? A. I was not.

MR. SMITHSON: Would Your Honor indulge me just a moment, please?

THE COURT? Yes.

(Short pause in proceedings.)

BY MR. SMITHSON:

Q. Mrs. Johnson -- Mrs. Gardiner, were you not asked the question by the Grand Jury with regard to your capping narcotics on the first occasion you met Ricky or the agent? A. Did you finish?

Q. Yes: I did. A. I didn't understand what you said.

1825 Q. Were you not asked the question with regard to capping up narcotics on this first occasion that you met Ricky by a member of the

Grand Jury? A. I cannot answer that.

Q. Mrs. Gardiner, were you asked: "Did you cap any yourself?" to which you answered, "Yes; I have." and the question, "In this recent incident?" Answer: "Yes, I capped on the first occasion when I met the Agent."

Were you not asked those questions and did you not make those answers? A. I can answer that question but I can't answer yes or no.

Q. Were you not asked those questions and did you not make those answers before the Grand Jury? A. I cannot answer.

Q. Actually, Mrs. Gardiner, on the night of the 8th of March 1962, Agent Broadnax did not come all the way into that office where you were, did he? A. When?

Q. On the night of your arrest, Mrs. Gardiner, on March the 8th of 1962 when you were in the Internal Revenue Building is it not a fact that Agent Broadnax did not come all the way into that room, only to the door and that he did not speak to you? A. We talked.

1826 Q. Is it not a fact that you told him in the presence of others that you didn't want to see him; take him away; you didn't want to see him? A. I said I didn't want to talk to him.

Q. Didn't want to see him or talk to him? A. I said I didn't want to talk to him. I had seen him already.

Q. Is it not a fact that you did not speak with him or he with you? A. I asked him why would Joseph Jackson do this to me.

Q. I see.

Q. I understood your testimony on direct, Mrs. Gardiner, that you saw this Exhibit 15 on March the 8th, is that correct? A. I did not make that statement.

Q. Did you not make the statement on direct that you saw it, but you did not remember whether or not you signed it? A. I know I didn't sign it on the 8th.

Q. I'm not asking what you know, Mrs. Gardiner; I'm asking you on direct examination were you not asked those questions and did you not make those answers? A. Asked a question about who?

1827 Q. Your counsel, Mr. Johnson? A. And what was the question?
MR. SMITHSON: May the reporter read the question and answer?
THE COURT: Yes.

(The reporter read the question and answer as follows:

"Question: Did you not make the statement on direct that you saw it, but you did not remember whether or not you signed it?"

Answer: I know I didn't sign it on the 8th.

"Question: I'm not asking what you know, Mrs. Gardiner; I'm asking you on direct examination were you not asked those questions and did you not make those answers?")

MR. JOHNSON: I object to that, if Your Honor please, as to whether she was asked that question or not. The question is whether that is her testimony.

MR. SMITHSON: No, it isn't either, Your Honor.

MR. JOHNSON: The question is whether she did not state something, not whether she was asked it, whether she was questioned. She is not required to remember every question that is asked her. She is only responsible for the truth of her answers.

1828 MR. SMITHSON: Your Honor, that was a very nice speech which I must object to because it obviously coaches the witness on how to answer. I think the question was proper.

THE COURT: I think maybe the answer is not too clear to her. Instead of saying on direct, which she may not understand, you could say when Mr. Johnson questioned you didn't you say thus and so. It might be helpful to her.

MR. SMITHSON: All right.

BY MR. SMITHSON:

Q. Mrs. Johnson -- Mrs. Gardiner, when you were testifying earlier to queries of questions by Mr. Johnson, did you not testify that you saw the Exhibit 15, the statement, on the 8th which you were not sure whether or not you signed it? A. I don't think I said that, Mr. Smithson.

MR. SMITHSON: I don't have anything more.

THE COURT: Mr. Johnson.

REDIRECT EXAMINATION.

BY MR. JOHNSON:

Q. Now, Mrs. Gardiner, during the course of your cross-examination you expressed a desire to explain some of your answers. Do you care to do that now? A. I couldn't answer the questions Mr. Smithson
1829 asked me about the Grand Jury room because most of the questions were put before me were prearranged. I knew that I was testifying to mostly lies, but it was prearranged by me, the narcotics agents and Mr. Smithson. I knew that I was under oath, but at that time I had decided to cooperate with him.

Q. Is that why you answered the way you did in the Grand Jury room? A. Yes.

MR. JOHNSON: That's all.

RECROSS EXAMINATION.

BY MR. SMITHSON:

Q. Then I understand you are changing your testimony to say that you did make those answers to those questions?

MR. JOHNSON: Now, just a second, just a second, Mrs. Gardiner. I object to that. It is not a question of whether she's changing her testimony or not or what she's doing with her testimony, may it please the Court. I think he can ask her what her testimony is or he can ask her whether a certain thing is true or not.

THE COURT: Well, now, she has testified that she cannot answer the question, certain questions.

MR. JOHNSON: Yes; and she gives an explanation for that.

1830 THE COURT: I do not know just what she is explaining because you did not tell us in your question what it was you were asking about, which particular thing that she testified to.

MR. JOHNSON: Well, if Your Honor please, I believe during the course of the examination I thought it would require me to go over fifty questions, and I asked her would she --

THE COURT: That is all right. You do not need to make any explanation.

Is there a question pending?

(The reporter read the pending question as follows:

"Question: Then I understand you are changing your testimony to say that you did make those answers to those questions?")

THE WITNESS: I'm not changing anything.

BY MR. SMITHSON:

Q. Let me ask you then, Mrs. Gardiner, was I in that Grand Jury room? A. I talked to you before I went in the Grand Jury room.

THE COURT: That is not the question.

BY MR. SMITHSON:

Q. You know what the question was. Was I in there? A. No; you weren't.

1831 Q. It was a Grand Jury body of 23 people there? A. I didn't count them, but it was quite a few.

Q. A Court Reporter there? A. Yes.

Q. An Assistant who asked you some questions? A. Yes.

Q. It wasn't I, was it? A. No.

Q. I wasn't in the room?

MR. JOHNSON: If Your Honor please, he's asked her whether he was in the room twice now.

THE COURT: The objection is sustained.

BY MR. SMITHSON:

Q. Tell me, Mrs. Johnson ---

MR. JOHNSON: If Your Honor please, I don't think maybe one time is all right for a slip of the mouth; two times is all right, but not three times.

MR. SMITHSON: I apologize, Mr. Johnson; it was not deliberate. I do apologize; it was not deliberate.

BY MR. SMITHSON:

Q. Mrs. Gardiner, did I come to the door to watch you? A. I don't know; I didn't look out the door. I think the door was closed, but I didn't look.

1832 MR. SMITHSON: Nothing else, Your Honor.

FURTHER REDIRECT EXAMINATION

BY MR. JOHNSON:

Q. Mrs. Gardiner, how soon before you went into the Grand Jury did you see Mr. Smithson? A. Mr. Smithson was there when I went in the Grand Jury room.

MR. JOHNSON: That is all I have.

THE COURT: Is that all?

MR. JOHNSON: That's all.

THE COURT: Step down, please.

(The witness left the stand.)

MR. JOHNSON: If Your Honor please, I would like to call Mr. Smithson.

MR. SMITHSON: Is Your Honor going to take a recess for a few minutes?

THE COURT: Yes. It is time for the usual recess and we will take a recess of five minutes.

(Short recess).

1833 (The following occurred out of the presence of the jury:)

THE COURT: Will counsel come around here, please?

I'm not sure whether the jury understands that whatever this defendant, Gardiner, said before the Grand Jury, wouldn't be admissible as to the other defendants.

MR. SMITHSON: Well, Your Honor, I asked, if I recall correctly, that you -- I started to cross-examine, and Your Honor, I thought, gave that instruction; I know I asked it, Mr. Shorter and I, before I started to ask the question, I asked you to admonish the jury. Mr. Shorter's recollection would be the same as mine, that you gave it.

MR. SHORTER: You did give the admonition, Your Honor; that is my recollection.

THE COURT: About the Grand Jury?

MR. SMITHSON: About any names mentioned in that testimony, is my recollection.

MR. JOHNSON: In Doris Gardner's testimony, Your Honor. I don't think any specific mention was made of the grand jury.

MR. FIRST: As to what Doris Gardiner said on the stand, I think Your Honor instructed the jury that it wouldn't apply to the other defendants.

MR. SHORTER: I don't think it would hurt to give it again.

1834 MR. SMITHSON: I have no objection.

THE COURT: I think I will. I don't have a recollection of saying anything.

MR. SMITHSON: Well, I do, Your Honor, and I thought Mr. Shorter, as he acknowledged it, and Mr. First and Mr. Johnson, that you did.

MR. JOHNSON: You did give it.

(The jury returned to the courtroom.)

THE COURT: Members of the Jury:

You will recall that when Mrs. Gardiner was on the stand as a witness that she testified to certain things that she said before the Grand Jury. You are told that whatever she said she said before the Grand Jury is admissible as to her, but it is not admissible and is not to be considered by the jury as against the other defendants.

Now, Mr. Johnson, are you ready to go ahead?

MR. JOHNSON: Yes, ma'am.

(Alfred Hantman, Assistant United States Attorney, appeared on behalf of the Government.)

Thereupon.

FREDERICK G. SMITHSON

was called by the defendant, Doris L. Gardiner, and, being first duly sworn, was examined and testified as follows:

1835

DIRECT EXAMINATION,

BY MR. JOHNSON:

Q. Will you state your name, sir? A. Frederick G. Smithson.

Q. Are you employed, sir? A. I am.

Q. And in what capacity? A. I am Assistant United States Attorney.

Q. How long have you been so employed? A. Since the first of 1950.

Q. Directing your attention to the period between June, 1961, throughout March the 15th, 1962, were you so engaged in the District of Columbia, sir? A. I was employed as Assistant U.S. Attorney for that period of time.

Q. And what particular special duties did you have, sir? A. I was assigned to the Criminal Trial Division, sir.

Q. With reference to warrants of arrest, what particular duties were you assigned, sir? A. At that time there were three of us; at present there are only two. But at that time I was assigned the capacity of reviewing any applications for arrest and search warrants from all Federal investigative agencies, all police squads, all police precincts.

1836 Q. In that particular regard were you not, sir, as part of your duties, to advise with the Narcotics Bureau as to the sufficiency or insufficiency of warrants for narcotic arrests in the District of Columbia? A. In general, Mr. Johnson?

Q. Yes. A. Yes.

Q. In particular, sir, were you not so engaged with reference to this case? A. Do you mean Doris L. Gardiner, sir?

Q. All of the case, sir. A. There would come a time when I did see it, yes.

Q. What do you mean, "there would come a time," when did the time come from June, 1961 through March the 15th, for the first time?

A. To my recollection, sir, it was March the 8th, or a day or so before.

Q. Did you not, sir, confer with the narcotics agents in February, about this case? A. I have no recollection of conferring specifically about any of the named defendants in this case, sir.

Q. But you do not deny it? A. I would deny it, sir, unless it is shown, some reference that I could adopt, and if you can show me I will
1837 adopt it, if I saw it.

Q. Did you deny, sir, that you looked over the arrest warrants for each one of the defendants in this case? A. When, sir?

Q. Any time, before they were issued. A. Mr. Johnson, to the best of my recollection, I knew something of this case approximately March the 8th, maybe a day or two before, and if I reviewed these particular arrest warrants, Mr. Johnson, I submit a slip to the United States Commissioner for the District of Columbia, which will show when I saw it and the date.

Q. Mr. Smithson, do you remember testifying before? A. Yes, sir.

Q. Did you not know, sir, that that question had been asked you?

A. What question, sir?

Q. The question I just finished asking you. A. If you did, sir, certainly not in the form -- I don't recollect it in the form you just asked it, sir.

Q. Did you not say, sir, this, in your sworn testimony here --

MR. HANTMAN: If Your Honor please, may we have the full question and answer?

THE COURT: Yes.

1838

BY MR. JOHNSON:

Q. Yes, the full question and the full answer, sir. Page 1183, did I not ask you this question, sir, "And did you receive any papers from the narcotics agents with regard to any statement she had made at any time after March 8th, sir? Answer. I can say this to you, Mr. Johnson. I know from records of the Federal Bureau of Narcotics that they conferred with me relative to the arrest of Doris L. Gardiner and other defendants ---". A. Yes, sir, I did. But that's not the question you asked me, sir.

Q. Now did you, prior to the arrest of these defendants, confer with the narcotic agents? A. To the best of my recollection, I think so, but the best proof of it would be that slip, Mr. Johnson.

Q. I see, sir. Now, Mr. Smithson, isn't it true, sir, that you reviewed each one of the arrest warrants for the defendants in this case and told -- A. Excuse me, I am sorry.

Q. -- and told them, sir, whether it was sufficient or insufficient, or what was necessary to have, before you would authorize them to get an arrest warrant? A. Mr. Johnson, may I break your question down

into its component parts?

1839 Q. Yes, sir, if you cannot answer it as I asked it, you may, sir.

A. Thank you. My recollection, Mr. Johnson, is that approximately the date of arrest the agents conferred with me, as is their wont, in most such cases. I am not positive beyond all doubt; I believe I was conferred with with regard to the arrest of all of these defendants; I do not believe that I reviewed each and every warrant. It is my recollection, sir, that it was one document. I may be in error on that, sir.

Q. Did you confer with them prior to issuance of the warrant on Doris L. Gardiner? A. To the best of my ability I have answered your question, Mr. Johnson.

Q. You can't answer that yes or no? A. I don't believe so, sir; I would prefer to see that file, if you want a yes or no.

Q. When was the first time you found out about Joseph Jackson? A. I found out about Joseph Jackson?

Q. Yes, sir. A. What do you mean, sir?

Q. Well, did you know of any activities that he had in this case? A. I can say this, Mr. Johnson, I did not know of Joseph Jackson at the
1840 time of the arrest of Doris Gardiner.

Q. I see, sir. Now, tell me this, Mr. Smithson, directing your attention to March the 15th, do you know how Doris L. Gardiner got to your office? A. On March 15th, 1962?

Q. Yes, sir. A. It is my recollection, sir, I utilized what is known as a come-up order to bring her up, as I understood she desired to talk to me.

Q. She desired to talk to you? A. That is what I was informed.

Q. Did you get that information from her? A. No, sir.

Q. Who did you get the information from? A. From agents of the Federal Bureau of Narcotics.

Q. What agents? A. I can't specify; Reed or Heneghan, in all likelihood.

Q. She desired to talk to you for what purpose? A. Mr. Johnson, I was told that Doris L. Gardiner wanted to testify as a Government

witness; she wanted to testify, sir, as a Government witness in a conspiracy case.

Q. Now, the narcotic agents told you that she had expressed the desire to testify in a conspiracy case? A. As I understand it, sir, she desired to testify; whether it's a conspiracy or not is up to the prosecution in its submission to a grand jury. We had no indictment at that time, Mr. Johnson.

Q. Well, what did you mean by saying that she wanted to testify in a conspiracy case? A. I meant, Mr. Johnson, that if she desired to testify, as I understood she did, from her statement and from her conversation with me, I would seriously consider conspiracy charges against certain defendants.

Q. I see. Now, did you seriously consider conspiracy charges against Doris L. Gardiner? A. Yes, sir.

Q. Did you ever tell her that? A. Yes, sir.

Q. When? A. Mr. Johnson, it's my best recollection that I acquainted the defendant, Doris L. Gardiner, after there were certain preliminary statements by me to her on the 15th of March that I would not and could not dismiss charges against her, as she would be named a defendant; that I would, if it was her desire to cooperate and to appear as a witness, permit her to plead to one count of this indictment.

Q. How did you know the grand jury was going to return an indictment? A. No way of knowing it, sir, not even able to say, sir, that I would have the case.

1842 Q. How did you know how many counts they were going to return at that time? A. I said, sir, I didn't know that they would return an indictment or how many counts; I know what we would submit to the grand jury.

Q. How did you know what you were going to submit, before she came in to testify? A. Because, sir, I had received information that there was a certain stated number of transactions involving Doris L. Gardiner and others.

Q. Now, is it your testimony, sir, now, that when you first saw

Doris Gardiner you told her that she was going to testify as a Government witness in a conspiracy case, is that right? A. That's not my testimony, sir.

Q. You didn't tell her about the conspiracy? A. Did I mention the word conspiracy to her? I don't recall whether I did or not.

Q. You gave her some legal advice, though, didn't you? A. I did not.

Q. Didn't you advise her she ought to have a lawyer? A. That, sir, is precautionary, not legal advice.

1843 Q. I see. And you just gave her that information -- You didn't give her that as United States Attorney for the District of Columbia, did you? A. I thought I did, sir.

Q. I see. And you thought she ought to have a lawyer? A. I certainly did.

Q. Now, when did you tell her that? When you first saw her? A. Yes, sir.

Q. And -- Or, did you tell her that after you talked to her? A. I can say, without any equivocation, when I first saw her, sir.

Q. Just as soon as she came in the door. A. As soon as she walked in and sat down, I introduced myself and told her.

Q. She ought to have a lawyer. A. She didn't have to speak to me and shouldn't answer any of my questions, unless she wanted to, and I thought she ought to have legal advice.

Q. And she said she thought she ought to have it, too, didn't she? A. She said she would like to speak with one.

Q. Well, why didn't you stop talking to her then? A. I did.

1844 Q. Didn't you tell her that you weren't going to drop any charges? A. Not at that particular point, as it is my recollection.

Q. Now, didn't you testify before that you did? Under oath? A. I testified, Mr. Johnson, that in my best recollection there were two conversations that I had with her, both before and after Mr. Tinney was there. Now, whether or not I said that she would -- that I wouldn't drop the charges against her before or after, I frankly don't recall. That

was several days ago.

Q. Now, Mr. Smithson, don't you remember testifying in this Court before Her Honor? A. I certainly do, sir.

Q. Don't you remember telling Her Honor that you told this girl within the first minute and a half of your conversation with her that you wouldn't drop any charges, and, not "wouldn't" but "couldn't". A. Mr. Johnson, it is my best recollection that I warned her --

Q. Mr. Smithson, tell me this, sir --

MR. HANTMAN: If Your Honor please --

BY MR. JOHNSON:

Q. -- other than your recollection --

1845 MR. HANTMAN: -- If Your Honor please, the witness should be permitted to finish his answer.

THE COURT: Read the preceding question and the answer as far as it had gone, and then the witness can finish the answer.

(The reporter read as follows: Question. Don't you remember telling Her Honor that you told this girl within the first minute and a half of your conversation with her that you wouldn't drop any charges, and, not wouldn't, but couldn't? Answer. Mr. Johnson, it is my best recollection that I warned her -- Question. Mr. Smithson, tell me this, sir --)

THE COURT: Yes, you may finish.

THE WITNESS: It is my best recollection, Mr. Johnson, that I warned her; I may have so advised her at that time but it is not my recollection at this time. I may have, sir.

BY MR. JOHNSON:

Q. Mr. Smithson, I said, did you not testify, not your recollection, didn't you testify under oath in this courtroom that you told that girl in the first minute and a half of your conversation with her that you could not drop all her charges? A. Mr. Johnson, I have answered the question to the best of my ability, or my recollection.

1846 Q. You can't say whether you testified to that or not? A. Sir, I can't say whether I testified to it or whether or not that didn't occur, sir.

Q. Do you know whether it occurred or not? A. I know that she was advised of that, sir.

Q. Well, now, did that occur after you told her immediately that she needed a lawyer? A. Mr. Johnson, to the best of my ability, I tried to state to you my recollection of what occurred in March of 1962. I have no notes; I have no recordings, and made none, sir.

Q. Now, Mr. Smithson, sir, you told her that you were going to call a lawyer. How long before you told her that did you call Mr. Tinney? A. Mr. Johnson, whether I called an attorney, Mr. Tinney, before -- I think I probably spoke to Mr. Tinney before I spoke to her, to see if he would be available, is my recollection, sir, if she desired to speak to an attorney, and whether or not, sir, I asked him to come over and stand by, I cannot answer.

Q. Well, now, as a matter of fact, Mr. Smithson, didn't you call Mr. Tinney before you said one word to this girl? A. It is my recollection that I had spoken to Mr. Tinney in advance, to see if he would be available, yes, sir.

Q. Well, now, why would you pick out Mr. Tinney? A. I picked out Mr. Tinney, sir, because he is a member of the bar, and I believe he has the best interests of his clients in his heart.

Q. Now, why would you pick out Mr. Tinney before you know whether she would have paid him or not? A. Mr. Johnson, Mr. Tinney, as other attorneys, have worked for nothing.

Q. Do you know Mr. Murray. A. Yes, I know Mr. Murray; I work with him.

Q. What position does he occupy in this courthouse? A. Mr. Murray is the head of a sort of a legal defender's office.

Q. With a staff of investigators, to your knowledge? A. Staff? I know of one or two, yes, sir.

Q. Don't you know there's one hundred thousand dollars appropriated to his office for the defense of the indigent? A. I understood it was seventy thousand, Mr. Johnson.

Q. Well, you knew that, though, didn't you? A. Yes, sir.

1848

Q. Now that's just one floor up, isn't it? A. Yes, sir.

Q. You know who Mr. Murray was? A. Very well, sir.

Q. A very able lawyer. A. No question.

Q. Been in the United States Attorney's office how long? A. Sir, he was in there when I came in, and I was pleased to work under him, and he went from there to Assistant Attorney General, until around 1952.

Q. Why didn't you send her up to Mr. Murray, just one floor up? A. She was in custody, sir.

Q. Well, why didn't you ask Mr. Murray to come down? A. Mr. Johnson, Mr. Murray and I have tried some cases together, since he was appointed to this position, but I understand he is doing mainly staff work at the present, and, to request one of his counsel I don't think is wholly appropriate. I made a judgment; I selected Mr. Tinney to see if Mr. Tinney would be willing to speak to this defendant.

Q. Is it a practice of your office, sir, to call lawyers in private practice to defend people charged with crime when they are in your custody? A. They are not in my custody, sir, but it has been my practice, before I speak to anyone who may be a defendant, and in this case who was a defendant, that that person receive not only advice and warning from me, but an opportunity to speak to a civil attorney, not in the United States Attorney's Office.

Q. I see, sir. Now, tell me this, Mr. Smithson, is it not a fact that you picked Mr. Tinney for a particular, special reason and purpose? A. A particular, special reason; would you specify that, sir?

Q. I said, is it true, sir, first? A. I can't answer your question unless I know what reason you assess to it.

Q. I want to know the reason you picked him, sir. A. I think, Mr. Johnson, I have answered you that I have known Mr. Tinney for several years; I have known that in his practice he has wholeheartedly represented his clients, whether paid or not.

Q. Mr. Smithson, specifically, sir, didn't you pick Mr. Tinney to represent this girl for another reason? A. No, sir.

Q. Isn't it true, sir, that you knew that Mr. Tinney -- Didn't you

recommend him to Johnson, too? A. As I recall, Mr. Johnson --

Q. Mr. Smithson --

MR. JOHNSON: If Your Honor please, can't he answer yes or no; it is whether he recommended him or not is just a question of fact.

THE WITNESS: Not altogether, sir.

BY MR. JOHNSON:

Q. Well, did you recommend him or not? A. I suggested, sir, that he should see a possibility of, it is my recollection, two or three other people.

Q. Did you include Mr. Tinney? A. Oh, Mr. Tinney was one of them.

Q. Now, Mr. Smithson, when Mr. Tinney came in did you talk to him, sir? A. When, sir?

Q. When he came in that fateful morning on March the 15th? A. 15th. I believe I had a few words, conversation, with Mr. Tinney.

Q. Tell us what you told him. A. To the best of my recollection, at that time I told him that the defendant Doris L. Gardiner was under charges, that I thought he ought to speak to her, as I understood she wanted to make a further statement, and I thought she ought to have advice. That's my best recollection, Mr. Johnson.

Q. And is that all you told him? A. When he first came in, sir?

Q. Whenever he came in. Did he come in twice? A. Sir, I have spoken to Mr. Tinney several times with regard to this case.

Q. That morning, on March the 15th, Mr. Smithson. A. Mr. Johnson, I have one other point that I may have mentioned to him at that time; I am not certain and therefore I cannot answer your question.

Q. I see, sir. Now, Mr. Smithson, isn't it true, sir, that you selected Mr. Tinney because he has performed for you before, in your office there? A. Mr. Tinney, sir, is not on the string to the United States Attorney's Office, and he does not perform at my beck or bidding, and I have had several vigorous trials with Mr. Tinney.

Q. Answer me, sir, isn't it true, sir, that in a similar situation, your office picked Mr. Tinney, and you had good reason to know that he

would perform? A. I have no knowledge of what case you have reference to.

Q. Didn't you refer this young lady to a Catfish Turner case?

A. To my recollection, no.

Q. As a matter of fact, didn't he appear in the Catfish Turner case, to your knowledge? A. I wasn't counsel in that case, sir.

Q. I asked you, to your knowledge, didn't he appear in that case?

A. What I would have to give you is what someone else told me.

Q. As a matter of fact --

THE COURT: Just a minute. You are not to give us what someone else told you.

THE WITNESS: That was the reason for my answer.

BY MR. JOHNSON:

Q. Was it common knowledge in your office, sir --

THE COURT: Now, we won't go into what was common knowledge in his office; we want to go into just what his personal knowledge is.

BY MR. JOHNSON:

Q. Now, there came a time, before Mr. Tinney talked to this girl, you found out she didn't have any money, isn't that right? A. I was advised to that, sir.

Q. By whom? A. I'm not certain.

Q. Well, now, who could advise you as to that? Did you talk to the defendant, Doris Gardiner? A. It would be my recollection, Mr. Johnson, that the agents so advised me.

1853 Q. The girl didn't tell you? A. She may have, sir, but I said I thought that the agents had also advised me.

Q. Mr. Smithson, didn't you testify under oath at a prior hearing that this young lady told you she had no money? To hire a lawyer? A. I believe that's correct, yes, sir.

Q. Now, isn't it true, can't you testify now to the same way you testified before? A. I am, sir.

Q. Now, answer me then this, sir, did that young lady not tell you that she didn't have any money to hire a lawyer? A. Yes, sir.

Q. Well, now, what did you mean by asking her that she would have to make arrangements with Mr. Tinney about a fee? A. I felt that it was perfectly appropriate to so advise her, that if Mr. Tinney could make arrangements with her or her family for a fee, he was entitled to it, sir; I don't support him; I don't pay him, and if she was satisfied with him he should be paid if she could afford it.

Q. Now, is it not a matter of your personal knowledge that this Court universally has always appointed lawyers for defendants who can't pay? A. No, sir.

1854 Q. You don't know that that's true? A. Some of them don't want attorneys.

Q. To anybody that wants a lawyer, who hasn't got the money to pay him, this Court will see that he gets a lawyer, isn't that true, to your knowledge? A. No question about that.

Q. Well, didn't you know that this Court would appoint a lawyer for that young lady? A. Oh, if she asked, yes.

Q. Why did you want to substitute yourself for this Court? A. I didn't. I wanted to put a barrier between her and me, by way of a lawyer, sir.

Q. And you wanted a particular kind of barrier, didn't you? A. I wanted a lawyer, sir, who would give her representation.

Q. You know what representation he gave her, don't you? A. You, sir, supplanted him; no, I don't.

Q. Don't you know that he told her to cooperate with you? A. Do I know what he said to her?

1855 Q. Don't you know that he told her that, sir? A. I think you are asking for hearsay, sir.

Q. Well, don't you know it, sir? I didn't ask you what I was asking. Don't you know it's true?

THE WITNESS: Your Honor, there seems to me to be a privilege as to what the attorney may have said to her. I don't know that I am free to go into that.

THE COURT: I think he can only testify of his own personal knowledge.

MR. JOHNSON: That's all I am asking.

BY MR. JOHNSON:

Q. Don't you know it's true? A. May I answer your question?

Q. I have asked it, sir. A. I know Mr. Tinney, at a later conference in the United States Attorney's Office, my office, advised me in the presence of this defendant that he had talked with her and conferred with her, sir, and had advised her, in his legal opinion, it was to her best interests to testify truthfully.

Q. You mean he told her that on March 15th. A. No, sir, this was at a later time. I have seen this defendant several times after the 15th of March, sir.

Q. I don't want to know how many times you have seen her. Don't you know, as a matter of fact, on that day, on March the 15th, she received the advice from Tinney to cooperate with you, on March the 1856 15th, sir. A. I can't say I specifically knew it on the 15th, sir; I know that he told me, and, again, this is hearsay, sir, he told me he had conferred with her and learned from her that she desired to testify in this particular concern.

Q. He told you that on that day? A. He said that she had --

Q. No, on that day? A. -- expressed that desire. That's my best recollection, sir.

Q. On March the 15th. A. That's my best recollection.

Q. Now, tell me, sir, how long did you confer with her before Mr. Tinney got there? A. It is my best recollection, Mr. Tinney -- I mean Mr. Johnson, personally, that the conversation was roughly five minutes, maybe a little longer, but it's my recollection five minutes, broken up into two periods, is my best recollection.

Q. Didn't you confer with her, sir, for a half hour before Tinney got there? A. Not to my recollection, sir.

Q. Now, didn't you testify before under oath, before Her Honor, that it was only a minute and a half? A. I said, sir, it was approximately a minute and a half before Mr. Tinney came in and then I spoke to her later, for a total of about five minutes. 1857

Q. Sir, didn't you testify, sir, under oath, specifically, that your conference only lasted a minute and a half? A. That's not my recollection.

Q. Now, Mr. Smithson, after you got this advice, did Mr. Tinney, on March the 15th, after he talked with this young lady, tell you it's all right to continue the questioning? A. He said that she -- it's my recollection, again hearsay, -- had expressed the desire to give a further, more amplified statement, yes, sir.

Q. And Mr. Tinney told you that is what she was going to do, is that right? A. To general effect, sir.

Q. In other words, fitted -- that fitted in exactly with what you called her up for, wasn't it? That's exactly what you called her up for, wasn't it? A. No, sir.

Q. Well, why did you call her up? A. To see if she would.

Q. You didn't know that she would? A. Not finally, no, sir.

1858 Q. Now, sir, as a matter of fact, Mr. Smithson, didn't you want an additional statement from her because you were concerned about the legality of the statement she had already made? A. No, sir.

Q. Did you find out about the circumstances of that statement? A. I did, sir, approximately the 9th of March, I think it was, or maybe the 10th; I don't keep a diary, Mr. Johnson.

Q. Did you find out, sir, that they, the narcotics agents, disobeyed the arrest warrant? A. No, sir.

Q. Didn't you know that they did? A. No, sir.

Q. Have you ever seen the arrest warrant? A. As I answered you earlier, sir, I have a recollection of this matter, and if I saw it, the slip would be in the jacket, probably with the United States Commissioner.

MR. JOHNSON: May I see it, sir?

(The Deputy Clerk handed the jacket to Mr. Johnson.)

BY MR. JOHNSON:

Q. I am going to ask you to look at the warrant, sir. A. Yes.

Q. That warrant directs the narcotic agent to take the defendant,

Doris Gardiner, where? A. I am sorry, Mr. Johnson; I was reading the file.

1859 Q. Beg your pardon. I said, that warrant direct the narcotics agents to take Doris Gardiner where?

THE COURT: Mr. Johnson, you will remember the questions of law that we talked about, and which you were instructed you weren't to take up before the jury, questions of law.

MR. JOHNSON: Well, I am not going to take up any questions of law.

BY MR. JOHNSON:

Q. Did that warrant direct them to take Doris Gardiner to a specific place? A. They were ultimately directed to take Doris Gardiner before an available United States Commissioner.

Q. Did it say the word "ultimately"? A. No, sir.

Q. What does it say? A. "You are commanded to arrest Doris L. Gardiner, and bring her forthwith before the nearest available United States Commissioner to answer to a complaint, charging her with the unlawful possession and sale of a narcotic drug, to-wit, 17 grams, 680 milligrams, of heroin, on January 26, 1962, at about 3:33 p.m., at Washington, D.C., in violation of U.S. Code, Title 26, Section 4704(a)."

1860 Q. It told them to take her where? A. I said, before the nearest available U.S. Commissioner.

Q. Forthwith? A. It said "forthwith" before the preposition, yes, sir.

Q. And did you ever find out where they did take her? A. Yes, sir.

Q. You knew they took her to the Narcotics Bureau, didn't you? A. Sure.

Q. You knew they kept her there until 10 or 11 o'clock at night, didn't you? A. No, sir.

Q. Didn't they tell you that? A. They didn't, sir.

Q. They didn't tell you. A. They didn't keep her, sir.

Q. They didn't keep her there until 10 o'clock? A. That's what they told me.

1860 Q. Did you find out how long they did keep her?

THE COURT: Mr. Johnson, we are not going into hearsay, even by Mr. Smithson.

We want his personal knowledge, not what somebody else has told him.

1861 BY MR. JOHNSON:

Q. Now, Mr. Smithson, during the first conference, sir, in addition to talk, you told her that you couldn't and wouldn't dismiss all the charges, didn't you, during that first conversation? A. During the conversation of the 15th of March, that's correct.

Q. The first one. A. Sir, again I'm not certain, and I said that during the first. I may have.

Q. As a matter of fact, Mr. Smithson, didn't you testify before that you did - and that you did tell her that?

THE COURT: You asked him that before, Mr. Johnson, you have asked him that before, and he has answered it before.

MR. JOHNSON: Very well, if Your Honor please.

BY MR. JOHNSON:

Q. Now, sir, isn't it a matter of fact, in addition to about the conversation about dismissing all the charges, you talked about her go-back time? A. Yes, sir.

Q. And did you inform her that you would do something about getting her bond reduced? A. In response to a query from the defendant I made a statement to her.

1862 Q. About the reduction of the bond. A. At her request, yes.

Q. And you agreed to it? A. I agreed, sir, to reduce it, to my recollection, from \$5,000 to \$3,500.

Q. And that is all before this statement was obtained, is that right? A. No, sir.

Q. It is after the statement was obtained? A. You mean the statement, Government Exhibit 15?

Q. On March 16th. A. I know of no statement on March 16th.

Q. 15th, rather. A. My recollection, Mr. Johnson, is this

witness had expressed to me her desire to appear as a Government witness, understanding that she would have to dispose of the charges against her by a plea to at least one count, and had been informed that these counts, or prospective counts, because there was no indictment, could not be dismissed against her in toto, and I could do nothing about any back-up time before the question of bond arose.

Q. You told her all that before that question of bond arose? A. My recollection is, sir, - I know that I speak rather rapidly, and I know
1863 that what I gave her by way of advice was to that almost specific effect.

Q. You gave her legal advice, sir? A. I advised her, sir, that I didn't and couldn't and shouldn't speak to her before she had spoken to counsel, and I further advised her, so there would be no question in her mind, that I could not dismiss the charges against her, nor could I effect her back-up time.

Q. You said that you could not dismiss all the charges, did you say that? A. That's correct, sir.

Q. Is that true, sir? A. I think so.

Q. Isn't it true, sir, that under Title 23 of the District of Columbia Code, that you, as the United States Attorney, are authorized by statute, when you desire to call a defendant charged with crime to be a witness, that you are authorized by law, to dismiss all the charges?

MR. HANTMAN: I am going to object to this. May we approach the bench?

THE COURT: The objection is sustained. You don't need to approach the bench.

MR. JOHNSON: Would Your Honor indulge me a minute?

THE COURT: Yes.

1864 BY MR. JOHNSON:

Q. Now, Mr. Smithson, when you talked to Mr. Tinney, did you exhibit to him the statement of March the 8th, with her signature on it, on the morning of March the 15th, before she went down in the basement to sign those papers? A. I have --

Q. Yes or no. A. I have no recollection, sir.

MR. JOHNSON: That's all.

CROSS-EXAMINATION,

BY MR. HANTMAN:

Q. Mr. Smithson, how long have you been employed as Assistant U.S. Attorney? A. I think the exact date is the 20th of March, 1950.

Q. Now, in the more recent period of your experience, I understood you had indicated that one of your duties involved discussion with law enforcement officers, with respect to the authorization of arrest warrants and search warrants; how often do you do this? A. Every day, sir, and some nights.

Q. And how many agents in the various law enforcement offices of this Government of ours come to see you about the authorization of arrest warrants or search warrants? A. My secretary and I totaled, I believe, one occasion, 67 in one day.

1865 Q. And do you keep any record, other than the number, as to the contents or what is involved in any particular arrest warrant or search warrant, or who the names of the people are? A. No, sir.

Q. Now, on March 15th of this year, the defendant, Doris Gardiner, as well as the other defendants, were not yet under indictment, were they? A. No, sir.

Q. Do you have any control over the assignment of cases in the United States Attorney's Office? A. I do not during any month, except July.

Q. What's special about the month of July, sir? A. My superior is on leave and then I move up one desk.

Q. And then you actually make the assignment of cases. At that time, yes, sir.

Q. So that on March the 15th, 1962, did you know at that time, sir, that you would be asked or required to prosecute a case, if a case there should be, which would involve Doris Gardiner? A. I did not know that the case would be assigned to me, or that I would be specifically asked to take it.

Q. When do you first recall getting any information at all,
1866 concerning this case? A. You mean following arrest, sir?

Q. Or even prior thereto; when did this matter first come to your attention? A. This file reflects, Mr. Hantman, that insofar as the defendant Doris L. Gardiner was concerned that I had received some information to the effect that I have a slip which appears inside of this jacket, dated 2/7/62, February 7, 1962, wherein I requested the United States Commissioner --

MR. MITCHELL: Your Honor, I object to this. He may say what he did, but I object to his reading from this.

THE WITNESS: That's what I am trying to do.

THE COURT: I think the question was, when did this first come to your attention?

THE WITNESS: That's correct.

MR. HANTMAN: In this case.

THE WITNESS: And that's the date.

BY MR. HANTMAN:

Q. You said February 7th, 1962? A. Yes, sir.

Q. You took some official action in this matter? A. That's correct.

Q. What official action did you take on that date, sir? A. I re-
1867 quested the United States Commissioner to issue an arrest warrant for Doris L. Gardiner for violation of the narcotics statutes.

Q. How did this come about? A. The presentation to me by some members of the Federal Bureau of Narcotics, some statement of facts, sustaining or setting forth probable cause for her arrest.

Q. Did you see Doris Gardiner on February 7th, 1962? A. No, sir.

Q. Did you see Doris Gardiner on March 8th, 1962, the date Exhibit No. 15 in evidence was executed? A. No, sir.

Q. When was the first time in your recollection that you saw the defendant, Doris L. Gardiner? A. March the 15th.

Q. 15th. And what was the occasion for your seeing the defendant Gardiner on that date, sir? A. Having received certain information from agents of the Federal Bureau of Narcotics, I requested the United States Marshal, by means of what is known as a come-up slip, to have the prisoner, Doris L. Gardiner, brought up to the U.S. Court-house.

Q. And where was she brought, sir? A. Well, she was brought up to the U.S. Marshal's quarters, and, subsequently, at my request,
1868 taken to the third floor, in the southeast corner, the office formerly occupied by our law clerk in the United States Attorney's Office.

Q. Now, was there anyone with the defendant, Doris L. Gardiner, when she was in that part of this building, sir? A. Yes, there was a deputy United States marshal, Eleanor Kehl.

Q. She had the defendant then in custody, is that right? A. She did.

Q. Now, did there come a time, sir, when you went to that part of this building to see the defendant? A. It is my recollection, as I think about it, Mr. Hantman, that I was there, that I had gone there, that I had requested that she be brought up there.

Q. You told Mr. Johnson that you recall talking to Mrs. Gardiner something under five minutes, broken up into two parts. A. My recollection, about five minutes; that's my best recollection, sir.

Q. On the first occasion, when you spoke to the defendant Gardiner, was anyone else present? A. To my recollection and knowledge, Eleanor Kehl, Agents Heneghan and Reed.

Q. When you spoke to the defendant relative to the fact that she ought to have counsel, and advised her of her rights, were the Deputy
1869 Marshal, Kehl, and the agents present? A. Yes, sir.

Q. Now, you have already told Mr. Johnson, the Court and the jury, that you suggested to the defendant that she talk with Mr. William A. Tinney, a member of the bar of this jurisdiction. How long after you talked to her did Mr. Tinney show up? A. Mr. Hantman, I first inquired if she had an attorney or had anyone she wished to select, or knew an

attorney, before I even mentioned or intimated the name of Mr. Tinney, to my recollection.

Mr. Tinney was not long in coming. It's a little difficult to recall the exact time sequence, but, as I say, I have no recollection of speaking to Mrs. Gardiner for more than about five minutes. My recollection is he came in a minute and a half or two minutes, something like that, a very short time after I spoke to him.

Q. How long a period of time -- strike that, please. When Mr. Tinney arrived, was he afforded the opportunity to confer with the defendant, without anyone else being present? A. I asked, because that's all I can do, the Deputy marshal, if she would be willing to step outside of the door so we could close the door, and instructed the agents to step out, and I stepped out, and the defendant Doris L. Gardiner and Mr. Tinney were closeted in that office in private.

1870 Q. Now, can you give us your best recollection of how long Mr. Tinney was closeted with the defendant? A. Mr. Tinney spent, the best I can say, several minutes with her.

Q. When Mr. Tinney came out did you have a conversation with him? A. I recall a brief conversation with him.

Q. What did you do after that? A. I recall speaking again to the defendant Doris L. Gardiner and saying certain things that I desired, if she were willing to do so, to have accomplished, and leaving.

Q. Now, sir, Mr. Johnson asked you about the Legal Aid Agency that is operated by Mr. Murray. This Legal Aid Agency has investigators available to it. A. I understand, sir.

Q. Now, were these investigators, sir, of the Legal Aid Agency, as equally available to Mr. Tinney as to any other counsel? A. It is my understanding as a member of the bar that they are, that they make themselves available to Mr. Tinney for that purpose, or any attorney.

1871 Q. Any attorney. Now, counsel suggests to the Court and jury in his questioning of you that you have some special or particular reasons for selecting Mr. Tinney, and he asked you why you didn't go to Mr. Murray's office. Do you know Mr. Charles Murray personally? A. Yes, sir.

Q. How long have you known him? A. I have known Mr. Murray since March, 1950, and I have worked as a subordinate of him, and I felt and still feel of him as a very close friend.

Q. Would you ever, sir, suggest to a very close friend of yours that they represent somebody in a criminal case where you were on the other side? A. I understand the Canon of Ethics frowns on that conduct, sir.

Q. Do you feel the same kind of association with Mr. Tinney as you had with Mr. Murray? A. I respect Mr. Tinney, and his ability, but I certainly have not the close personal, every-day relationship that I have had in the past with Mr. Murray, and, in fact, well, it was a personal occurrence that showed to me a great deal of respect by Mr. Murray, and, as a result of which I have always felt particularly fond of him.

Q. Now, sir, after March 9, 1962, did you ever see Doris L. Gardiner beyond that date and before we got to trial? A. Yes, sir.

1872 Q. When was that? A. Several times, sir. I would say two, three, four times.

Q. Did you see her on March the 19, 1962, the date, as I understand it, she appeared before the grand jury? A. I did not.

Q. Did you have any conversation with her whatsoever, either directly or indirectly, on that date, sir? A. I did not.

THE COURT: What was this date?

MR. HANTMAN: March 19, Your Honor.

BY MR. HANTMAN:

Q. Subsequent to the time, sir, that Mr. Tinney concluded his conference with his client, Doris Gardiner, did you have any occasion to discuss this case with him beyond that time? A. Yes, sir, I have talked to Mr. Tinney about this case on other occasions, in the presence of the defendant; in fact, I have never talked to her out of the presence of someone, such as Agent Reed and Heneghan, others, and I believe, I'm not positive of this, but I believe that every time I have spoken to her, I have asked her if she desired Mr. Tinney present, or had him present; that's my best recollection.

MR. HANTMAN: I believe that's all the questions I have, Your Honor.

1873

REDIRECT EXAMINATION,

BY MR. JOHNSON:

Q. Mr. Smithson, did you see the defendant Doris Gardiner on the date she had her bond cut? A. I don't know what date her bond was cut, Mr. Johnson.

Q. Did you see her the date that that happened, regardless of what date it is? A. I have no recollection of seeing her, sir.

Q. Do you deny, sir, that you saw her the day that her bond was cut? A. As I say, I have no recollection of seeing her; I would have to say that I didn't on that particular date.

Q. And did you talk to Mr. Tinney on the date that her bond was cut? A. I have no recollection, Mr. Johnson.

Q. Do you deny that you had Mr. Tinney come over to the Commissioner's office for the purpose of having her bond cut? A. I don't believe I can direct Mr. Tinney, Mr. Johnson. When he appeared, if I spoke with him that date, or on any previous occasion, I have no recollection, sir.

Q. Now, during the course of your talk with this young lady about an attorney, did it not happen this way: that you told her that she should have an attorney, and she merely said yes, or shook her head, in acquiescence with which you were telling her, isn't that true? A. That's
1874 not my recollection.

Q. Isn't it true that you told her then that "I would appreciate it if you would get Mr. Tinney"? A. That's not my recollection.

Q. Let me see this. At page 1201 of the record, on the date of September 27th, before Her Honor, let me read this testimony and see if you recall that this happened:

"THE COURT: Tell him again first what you said the first time you talked to her, that is, before Mr. Tinney came, and then what you said after Mr. Tinney came on the same date.

"THE WITNESS:"-- that is you -- "It is my recollection

that when I first spoke to Doris L. Gardiner I told her who I was; I identified myself to her as an Assistant United States Attorney; that I told her that she did not have to make any statements to me, she did not have to answer any questions, and if she did, they could be used against her, and that I wanted her to know this.

1875 "I recall asking, or a conversation to this effect; that whether or not she had an attorney or knew one, to which she replied 'No' or shook her head, I'm not sure which, because she was a very soft-spoken person, she does not talk awfully loud and quite often uses head movements to indicate yes or no. I recall saying to her that I thought she should speak to an attorney, and that if she had none, I would appreciate it if she would talk to Mr. Tinney," --- didn't you testify to that here? A. In the context in which you have put the entire statement, yes, sir.

MR. JOHNSON: That's all.

MR. HANTMAN: No questions.

THE COURT: Step down.

(The witness resumed his seat at the trial table.)

THE COURT: Members of the Jury: We are going to recess now for the day, and we will go on with this case tomorrow, which is Friday. Please be here at the usual time in the juryroom, and keep in mind the admonition that I have given to you from time to time.

(The jury withdrew from the courtroom.)

1876 (The following occurred out of the presence of the jury:)

THE COURT: Mr. Johnson, do you think your testimony will take all of tomorrow?

MR. JOHNSON: If Your Honor please, will Agent Heneghan be here tomorrow?

MR. SMITHSON: The subpoena was placed on the agent, Your Honor, to return Friday, tomorrow.

MR. JOHNSON: I imagine I will finish tomorrow.

THE COURT: Well, I wonder if tomorrow, whoever is going to

make any requests for instructions, if you are going to request them, could I have them tomorrow?

MR. SHORTER: Yes, Your Honor.

MR. JOHNSON: I will tell you, Your Honor, I am going to try to do that. I have been on this the third week. I have the House of Prayers case that I have some problems with. It is litigation of long standing. I have a backlog of about twelve cases that I have had to dodge around about, and I think that some other judges are fairly irritated at me right at the present time. I will try to get it in here tomorrow morning. I will make an honest effort to get it here tomorrow.

MR. MITCHELL: Your Honor, we are faced with this difficulty. In the light of our previous discussion on it, we said to Your Honor that we would submit them Saturday. We made arrangements along that line.

1877

THE COURT: Saturday morning. I think you did.

MR. MITCHELL: Yes, ma'am.

THE COURT: I thought some counsel might have them ready; and if they do have them ready, I will be glad to have them. I don't know just exactly where we will be tomorrow. If we finish the case, we will need something to go on with; and I had assumed from your asking to present them Saturday morning that they wouldn't be needed before Saturday morning. And I thought when you suggested Saturday morning, since you all were in charge of the defense, that you would have some idea about how long your case would take.

MR. JOHNSON: Have you any rebuttal?

MR. SMITHSON: Yes.

THE COURT: How long will your rebuttal take, approximately, Mr. Smithson?

MR. SMITHSON: Possibly three or four witnesses.

MR. JOHNSON: So I don't think we need to worry about Saturday, if he has three or four witnesses.

THE COURT: If you could have them it would expedite matters to bring them in.

Now, I would like to see you all at the bench for a minute.

1878

(At the bench:)

THE COURT: You will be through here in just a moment, and I want all the defendants to stay until I finish. You know the other day Mr. Mitchell brought up this question of this publicity that was in the paper about this defendant Henry, and I purposely didn't say anything to the jury about any of this publicity, because it was right at the day that it was supposed to have been in the paper; and I thought if I mentioned it on that day that somebody might, you know, be interested in it.

MR. JOHNSON: Go out and look it up.

MR. MITCHELL: That is being realistic.

THE COURT: So I thought it would be better that whatever I did about it that I do not on that day.

MR. SMITHSON: I would suggest, Your Honor, that you include it as a part of your instructions. In other words, that would not highlight that it occurred, that if anything had appeared in the paper that anyone noticed, without regard to identity of a case or anything about this, of course, it is understood that they are to ignore all of that, that it is not evicende. That is the most that I think you could say.

THE COURT: I didn't think I would identify anything that was said in the paper. I think that would be more harmful than helpful.

1878-A

MR. JOHNSON: Probably so.

THE COURT: I thought that I would make a general statement.

MR. SMITHSON: I have a very general one in mind. That is what I mean, as general as Your Honor can.

THE COURT: All right. Thank you.

(In open Court:)

(The Court adjourned at 3:40 p. m.)

1879

Washington, D. C.
October 5, 1962

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MR. FIRST: The case for Valeria and Norman Pannell also rests,
Your Honor.

* * * * *

2003

Washington, D. C.
October 10, 1962

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2004

COURT'S CHARGE TO THE JURY

THE COURT: Members of the jury: When a case is tried to a jury, the Court consists of the judge and the jury. It is the duty of the judge to preside at the trial, to pass on questions of law as they arise, including the admissibility of offered evidence, and finally at this stage of the trial to instruct the jury as to the law applicable to the case. The jury is the fact-finding body of the Court. The jury is to decide what the facts are in the case. In determining the facts, you will look only to the evidence.

The evidence consists of the testimony which you have heard from the lips of the witnesses, the exhibits which have been received in evidence, and the stipulations entered into by counsel and stated to you in open Court. Also, you are to consider as evidence in the case those inferences which to your mind reasonably arise from the evidence in the case. After you determine what the facts are in the case, you apply to those facts the law as I shall state it to you, and then you deliberate and reach proper verdicts.

You are charged with the duty and responsibility of determining the guilt or innocence of each defendant in respect of each count of the indictment under which he or she is charged. In performing your duty and in reaching your verdicts, you will not let sympathy or prejudice
2005 influence your judgment. You will perform your duty fairly and impartially both to the Government and to the defendants. You will fulfill your responsibility unemotionally and objectively. Bear in mind

that it is your function to find the facts from what you have seen and heard in open Court from the sources that I have already indicated, and then to apply the law thereto as I shall state it to you, and reach proper verdicts. You will not guess or speculate or conjecture. But that does not mean that you cannot use your common sense and experiences in life in weighing and evaluating the testimony of the witnesses.

As I have observed you during this protracted trial, I have been impressed by your conduct and attitude toward this case. You have been constantly attentive and serious and mindful of your high responsibility. I am, therefore, certain that you will perform your duty fearlessly, conscientiously and fairly, and that is your obligation.

2006 You are not only the judges of the facts in this case, but you are the judges of the credibility of the witnesses. In deciding the credit or weight you will give to the testimony of a witness, you may take into consideration the appearance and demeanor and conduct of the witness on the witness stand, and whether the witness impressed you as a truth-telling individual or the contrary. That is simply another way of saying what all of us do in ordinary life. You may consider whether the witness looked and acted as if he or she were telling truthfully, frankly and honestly and freely what the witness knew to be so, or the contrary. You may consider the opportunity or lack of opportunity of a witness to know the matters about which the witness has testified, the reasonableness or unreasonableness of the testimony of a witness, and its probability or improbability. You may consider the contradictions if any in the testimony of a witness. You may take into consideration the frankness or lack of frankness of a witness, and any bias or prejudice which any witness may have displayed, or you may believe any witness has which may have influenced the judgment of that witness one way or the other. You may take into consideration the friendship or animosity of a witness if any has been shown toward a person or persons concerned in this case, and also any human factors shown by the evidence which to your mind may affect the desire or capability of a witness to tell the truth.

In dodging the evidence and determining the credibility of the witnesses, it is the truth which you must seek. Bring to your task your knowledge of human nature and your ability to judge men and women, their intelligence, their motives and their intentions. If you believe
2007 that any witness has wilfully testified falsely as to any material matter about which the witness could not reasonably have been mistaken, then you are at liberty to disregard the whole of the testimony of that witness or such part of it as you believe to be untrustworthy. The law leaves to your good sound judgment the findings of the facts, as well as the determining of the credit and weight you will give to the testimony of each witness who appeared before you.

You will recall that the witness Clinton Johnson testified that he participated in certain activities on December 21, 1961 which formed the basis of the charges in the indictment in Counts 2, 3 and 4, and that he has pled guilty to one of these counts. He is what the law refers to as an accomplice.

Now, anyone who knowingly and voluntarily cooperates with, aids, assists, advises or encourages another in the commission of a crime is an accomplice, and this is true regardless of the degree of his guilt.

It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the Government has the right to use an accomplice as a witness. It is the duty of the Court to admit the testimony of an accomplice, and that of the jury to consider it.

2008 It should be received with caution and scrutinized with care. After you have received it with caution and scrutinized it with care, you may then give it such weight as you believe it is entitled to receive. The degree of credit which you give to such testimony is a matter exclusively within your province. You may, as a matter of law, convict a person accused of crime upon the uncorroborated testimony of an accomplice, if you believe the accomplice, but you should do so only after you have carefully and cautiously scrutinized such testimony.

You are told that if you find that Clinton Johnson believes he will, personally, benefit from testifying for the Government in this case, then the jury, in determining his credibility as a witness, may take that circumstance into consideration.

The jury will recall that among the witnesses in this case were certain agents of the Federal Bureau of Narcotics. You are told that the fact that they are such agents does not alone entitle their testimony to any greater weight than that of other witnesses. The jury is to apply to them the same tests as are applied to other witnesses in judging of their credibility. In weighing the credibility of the narcotic agents or other Government officers or employees who have been concerned in the preparation of the case and who were witnesses, you may take into
2009 consideration such interest in the case, and whether because there-
of their testimony was influenced in any respect.

When Clinton Johnson testified as a witness for the United States, it was brought out that he has been convicted of committing certain criminal offenses. The jury is the judge, as I have indicated, of the credit and weight to be given to the testimony of each witness; and in passing on the credibility of Clinton Johnson as a witness, his criminal record is one factor the jury may consider along with the usual factors ordinarily considered in determining the credibility of a witness. That is the only purpose for which the jury has been permitted to know of Johnson's criminal record.

You will recall also that when Joseph Jackson testified, it was brought out that he has a criminal record. In determining his credibility as a witness, you may consider his convictions.

The defendant Doris Gardiner was a witness in her own behalf. In determining her credibility as a witness, you may take into consideration her deep personal interest in the outcome of this case, and whether such interest tended to color or pervert her testimony in any way. You may also take into consideration in passing upon her credibility her prior criminal record. You are not to infer from the fact

2010 that she has prior narcotic convictions and other convictions that, therefore, she is guilty of the offenses here charged; but in deciding what credit you will give her as a witness, you may consider all her prior convictions, and except as may be otherwise indicated in these instructions, that is the only purpose for which you may consider any of such convictions.

As to any witness as to which the testimony indicates that he is or was a paid informer in respect of this case, you are to scrutinize his testimony with care, and in passing on his credibility, you may consider whether by reason of such employment his testimony was colored in any way.

The fact that a defendant is charged with crimes and that he has been indicted by a grand jury is not to be taken as an indication of his guilt. The only object and purpose of an indictment is to inform a defendant of the charge or charges against him, and to place him on trial. The indictment does not amount to evidence in any degree whatsoever. The only purpose for which it can be considered by you is to determine the charges of which a defendant is accused.

We have in our law what is known as the presumption of innocence. Every person accused of crime is presumed to be innocent. The presumption of innocence is evidence in favor of the defendant in a criminal case, and stands as his sufficient protection unless such presumption of
2011 innocence is overcome and removed by the evidence taken as a whole.

In this case, the law presumes that Charles Matthews, Ellen M. Phelps, Roland R. Henry, Norman Pannell, Valeria Pannell and Doris L. Gardiner are innocent of the offenses charged. In other words, each defendant here is presumed to be innocent of each charge against him or her. In respect of each charge, this presumption of innocence calls for the acquittal of a defendant unless the Government establishes by the evidence beyond a reasonable doubt that such defendant did commit the offenses charged.

In weighing the evidence, if the jury finds that all the admissible evidence as to a particular defendant as to a particular charge is just as consistent with innocence as it is with guilt, then the jury would apply the presumption of innocence and find him not guilty. That is because when the evidence is evenly balanced, it does not satisfy the requirement that a crime charged be proved beyond a reasonable doubt.

The defendants are not required to prove themselves innocent or to produce any evidence at all on the subject. A defendant in a criminal case, under our law, has the option of whether or not he will take the stand in the trial. He has the privilege of taking the witness stand if he chooses to do so. He is under no obligation to testify if he chooses not to do so. The failure of a defendant to take the witness stand and testify in his own behalf does not create any presumption against him. You must not permit that fact to weigh in the slightest degree against any defendant nor should it enter into the discussion or deliberations of the jury in any manner.

2012 The Government has what is called the burden of proof. That is the burden of establishing the charges beyond a reasonable doubt. The burden of proof is on the Government from the beginning to the end of the trial and applies to every element necessary to constitute each crime charged. The burden which the Government has does not require that proof of a crime charged be made to an absolute certainty or a mathematical certainty or beyond all possibility of mistake; but it does require proof of the guilt of the accused to a moral certainty, that is, beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and which is reasonable in view of the evidence in a case. You are also told that a reasonable doubt is such a doubt as will leave a juror's mind, after a candid and impartial investigation of the evidence, so undecided that he is unable to say that he has an abiding conviction of a defendant's guilt, or such a doubt as in the graver and more important transactions

2013 of life would cause a reasonable and prudent man to hesitate and

pause. If after an impartial comparison and consideration of all the evidence you can candidly say that you are not satisfied of a defendant's guilt, then you have a reasonable doubt; but if after such impartial comparison and consideration of all the evidence you can truthfully say that you have an abiding conviction of a defendant's guilt, such as you would be willing to act upon in the more weighty and important matters of life relating to your own affairs, then you have no reasonable doubt.

In order to justify the conviction of a defendant as to any count, the evidence as to him should be such that when you have considered it carefully and applied to it your sound and conscientious judgment as reasonable men and women, you can say that you have no reasonable doubt of his guilt. If as to any charge against the defendant the evidence falls short of convincing you to that extent, then such defendant should be given the benefit of that reasonable doubt and found not guilty. You may convict a defendant of a charge only if you have first found from the evidence that all the essential elements of the offense as charged have been established beyond a reasonable doubt. Later on the essential elements of each crime charged will be stated. By essential elements of a crime charged, I mean the things that go to make up the crime.

2014 In courts as well as in everyday life, there are two types of evidence which come into play in determining an issue. One is known as direct evidence; the other is known as indirect or circumstantial evidence. Direct evidence, for example, is evidence of a witness himself as to what he saw or heard as an eye witness to the crime under inquiry. Indirect or circumstantial evidence is supplied by testimony of facts and circumstances which tend to show that the offense under inquiry has been committed and by whom it has been committed. In other words, it is evidence which is composed of proved facts which raise a logical inference as to the existence of the fact that is at issue in a particular case. A simple example of circumstantial evidence

would be if you were to go to bed at night and no snow was on the ground and you awakened the next morning and found that the ground was covered with snow. It would be circumstantial evidence that it had snowed during the night, although you had not actually seen it snow.

Both kinds of evidence, direct and circumstantial, have been introduced in this case. Both kinds of evidence are equally entitled to consideration by a jury. Sometimes a jury may be more convinced by circumstantial evidence than by direct evidence. If the circumstantial evidence is sufficiently strong, it may be as convincing as direct evidence
2015 because circumstances speak for themselves, and if they are strong enough, they may lead to a definite conclusion. But the rule of law is whether the evidence be direct or circumstantial or a combination thereof, before there may be a conviction by a jury, you must find that the evidence adds up to proof beyond a reasonable doubt.

Now, in this case a typed statement allegedly signed by Doris L. Gardiner after her arrest has been received in evidence. It is designated Government's Exhibit No. 15. Such a statement is usually referred to as an admission or confession.

It is the contention of Doris Gardiner that the statement was not freely and voluntarily made or signed by her. She claims that before she signed it promises had been made to her, such as that she would not have to serve time for the things about which inquiry was made of her.

The Government, on the other hand, maintains that Doris Gardiner did freely and voluntarily make and sign the statement set forth in the exhibit in question; and further, the Government maintains that no promises or other improper inducements were made to her to obtain the statement, and that she was not threatened or intimidated in any way. The Government, moreover, claims that Doris Gardiner signed the statement on the same date as her arrest, that is, March the 8th; whereas Doris Gardiner claims that she did not sign it until March 15, which
2016 was about a week after her arrest.

You are told that a voluntary admission or confession is one made on the basis of free choice. It need not be volunteered in the sense of being made without request. However, to be voluntary, it must have been the result of a choice in a free mind and not the result of pressure, inducement or promise of reward by the interrogating official, which, of course, would make a truly free choice impossible.

It is for you as jurors to determine for yourselves whether the alleged confession of Doris Gardiner was made freely and voluntarily without any influence of hope or fear. If so, you may consider it. If not, it is not evidence for you to consider. If hope was engendered or encouraged that the defendant's case would be lightened or more favorably dealt with if she would confess, then that would be enough to exclude the confession thus obtained.

You are instructed that the law admits a confession in evidence if it is freely and willingly made, because human nature, human experience shows that a confession freely and voluntarily made is likely to be reliable. Ordinarily a person does not admit that she has committed a crime unless that admission is true. But the situation is otherwise if the confession is obtained by force or threats or by the exercise of any undue influence or as the result of promises. If a confession or an
2017 admission is obtained by such means, it must be rejected and disregarded by the jury. This rule is based on good reason. Human experience has shown that it is not uncommon for persons to admit the commission of a crime they have not committed if they are under mental or moral pressure or if they are acting as a result of intimidation or of a promise or under duress or coercion. By the expression, duress or coercion, I do not necessarily mean physical force. Duress or coercion includes all mental or moral pressure. Moreover, whether a confession be false or true, the law forbids the use of an extorted confession, that is, a confession obtained from the party making it by threat, compulsion, duress or coercion, or as the result of a promise or promises.

You are told that the statement allegedly made by the defendant may not be considered by you unless you are satisfied that the statement was voluntarily made; that is, willingly and voluntarily made. But this does not mean that such a statement must have been spontaneous, that is, that it came from the suggestion of the defendant. A confession or admission by a defendant does not have to proceed wholly at the suggestion of the defendant to be voluntary, and the fact that the same was elicited by questions propounded by the parties who had her in charge will not of itself render the same inadmissible.

2018 Unless you are satisfied beyond a reasonable doubt that the statement was made freely and voluntarily, then you must disregard such statement in its entirety. If, on the other hand, you have no reasonable doubt with respect to the voluntary character of the statement, then you are to consider it; but the weight you will give to it is entirely for you to determine, and you may give it such weight as you think it is entitled to receive.

Should the jury find that the statement was voluntarily made, then you are to keep in mind that the statement may be considered by the jury in that event as evidence against one defendant and one defendant only, and that one is the defendant Doris Gardiner. The statement is not to be considered as evidence against any of the other defendants, and you are not to draw any inference from the statement adverse to any defendant other than Doris Gardiner.

When the statement was admitted in evidence for the consideration of the jury, I explained why it may be considered against Doris L. Gardiner but not against the other defendants. I stated at that time the reason for this distinction is this: An admission or confession by the defendant Doris Gardiner, after her arrest, of participation in an alleged crime may be considered as evidence by the jury against her, together with other evidence, because it is, as the law describes it, an admission against interest which a person ordinarily would not make.

2019 However, if such defendant, after her arrest, implicates other

defendants in such an admission, it is not evidence against those defendants because as to them it is nothing more than hearsay. Even if the jury should find that a conspiracy existed and that Doris L. Gardiner was in it, still the statement would not be admissible against any co-conspirators, as it was not made during the pendency of or in furtherance of such conspiracy.

You are told also that the testimony of Doris Gardiner in Court as to what she said before the grand jury is not admissible as to the other defendants. If the jury should find that the admission or confession designated as Government's Exhibit 15 was not voluntarily made, then in addition to disregarding that exhibit, the jury would also disregard all the testimony given in Court concerning the content of that paper, and rely only on the other evidence in the case.

Now we come to the charges in the indictment. It would prolong this charge unduly for me to read the indictment to you, as it is quite long. The indictment and twelve copies of it will be made available to the jury in the jury room. There you may examine the indictment with care, and consider the charges in the light of the evidence in the case.

2020 The indictment is in twenty-two counts. Each count is in effect and in law a separate charge. While there are seven defendants named in the indictment, one is not on trial before you. That one is Clinton Johnson, and you are not required to render any verdict as to him. As to the other six defendants, you are to render a separate verdict as to each defendant with regard to each count in which he is charged.

You are instructed that the guilt or innocence of each defendant in respect of each charge against him must be determined by the jury separately. Each defendant has the same right to that kind of consideration on your part as if he were being tried alone.

Inasmuch as you will have a multiple-count indictment with multiple defendants, for your convenience the clerk will provide each of you with a paper containing a list of the names of the defendants and

after each name a box for the entry of your verdict as to the counts under which each defendant is charged. When you have reached your verdict in respect of all defendants as to all counts under which they are charged, I suggest you place it on this paper and keep it with you when you return to the courtroom to announce your verdict. Your foreman will announce the verdict, but if the jury is polled, each juror will be required to announce the verdicts separately. If you desire, your

2021 foreman and each of you may refer to the paper in order to refresh your recollection and to avoid confusion which might exist because of the number of defendants and the number of counts and the requirement which presents the necessity of your doing something in unaccustomed surroundings with which you have had little experience. I suggest for this purpose the entry of "G," that is, the letter "G" for guilty, or "NG" for not guilty in each box after each name.

This is a mere suggestion to you. You may use the paper if you desire. If you do not desire to use the paper, then you need not do so. It is only for your convenience and to avoid possible confusion. This is what the paper looks like (indicating).

The first count charges a violation of the conspiracy statute, that is, Section 371 of Title 18 of the United States Code, which reads, in pertinent part:

"If two or more persons conspire to commit any offense against the United States or to defraud the United States, and one or more of such persons do any act to effect the object of the conspiracy, each member of the conspiracy shall be" punished as the law provides.

I shall now tell you what the conspiracy count charges. It says
2022 that commencing on or about December 21, 1961 and continuously until on or about February 21, 1962, within the District of Columbia and at other places unknown to the Grand Jury, the defendants, and other persons unknown to the Grand Jury, unlawfully feloniously, wilfully and knowingly did combine, conspire, confederate and agree together and

with each other to commit offenses against the United States and to defraud the United States in violation of Section 4705(a) of Title 26 of the United States Code, and of Section 174 of Title 21 of the same Code.

Then Count 1 goes on to recite that it was a part of the said conspiracy that said defendants did sell, barter, exchange and give away quantities of narcotic drugs, that is, heroin hydrochloride, not in pursuance of written orders, written for that purpose, as provided by law, in violation of Section 4705(a) of Title 26 of the said Code.

Further Count 1 alleges that it was also a part of said conspiracy that said defendants facilitated the concealment and sale of narcotic drugs, that is, heroin hydrochloride, after said heroin hydrochloride had been imported, with the knowledge of said defendants, into the United States contrary to law, in violation of Section 174 of Title 21 of the United States Code.

2023 The first count of the indictment further alleges that the defendants committed, among others, thirty-three overt acts in the District of Columbia in furtherance of the said conspiracy, and to effect the objects of the conspiracy.

To say that certain overt acts are charged means that it is claimed that certain defendants did specific things pursuant to the alleged conspiracy. No effort will be made in this charge to list for you the thirty-three alleged overt acts, but you may refer in the jury room to Pages 2, 3, 4 and 5 of the indictment for information as to what they are.

As will later be indicated, it is not necessary that all of these overt acts be proved.

Now I shall endeavor to explain to you what is meant by conspiracy. By conspire is meant that two or more persons agree or reach an understanding to follow a plan or pursue a course of action. The gist of the offense of conspiracy is an agreement or combination between two or more persons to accomplish a criminal purpose by concerted action, attended by at least one overt act on the part of one of the conspirators to effect the object of the conspiracy.

A conspiracy has been referred to as a sort of partnership in crime, in which each member becomes the agent of every other member. It is an agreement or combination between two or more people formed
2024 for the accomplishment by concerted action of a criminal purpose. The gist of the offense is the combination or agreement to violate or disregard the law.

While a conspiracy necessarily includes an agreement to violate the law, it is not necessary to show that the persons charged with conspiracy met together and entered into a formal agreement. It is sufficient to show that they tacitly came to a mutual understanding in order to accomplish an unlawful purpose. Such an understanding need not be shown directly; that is, it need not be proved by a person who heard the plan made or was present when it was entered into. Ordinarily a conspiracy is characterized by secrecy. The agreement may be inferred from circumstances such as the conduct of the parties and the acts done by the accused persons. Such an agreement may be inferred from the fact that two or more persons are acting together in an endeavor to accomplish an unlawful result.

One defendant's connection with a conspiracy cannot be established by the acts or declarations of other defendants in his absence. But each defendant's acts and declarations may be evidence of his own connection with a conspiracy; and a conspiracy may be proved by the sum total of the independent declarations and acts of participants in the conspiracy.

2025 I have told you that the acts or declarations of one member of such conspiracy pursuant to the concerted plan and in furtherance of the common object can be considered as against the other conspirators, but you must first find a conspiracy before you may consider the acts or declarations of one against the others. In other words, if you find a conspiracy and if you find that a particular defendant is a member thereof, then you may consider as evidence against such member the declarations of his fellow-conspirators in or out of his presence, if they were made or done in furtherance of the objects of the conspiracy and during its pendency.

The jury is to understand then that in deciding whether or not a defendant is a member of a conspiracy, the jury is not to consider what others may have said or done. That is to say, the membership of a defendant in a conspiracy can be established only by evidence as to his own conduct, what he himself said or did. If and when it appears from the evidence that a conspiracy existed, and that a defendant was one of the members, then the acts thereafter knowingly done and the statements thereafter knowingly made by any other person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence or without the knowledge

2026 of the defendant, provided such acts were knowingly done and such statements were knowingly made during the continuance of such conspiracy, and in furtherance of the object or purpose of the conspiracy. This is because when conspirators join in a common plan or scheme to accomplish an illegal purpose, everything which is said or done by one of them in furtherance of the object of the conspiracy is deemed the statement or act of all who joined in the conspiracy.

A statement made by one conspirator is not admissible against another conspirator if it is made after the ending of the conspiracy or if made during its pendency but not in furtherance of the conspiracy. After a conspiracy has come to an end, evidence of acts or declarations thereafter made by any of the conspirators can be considered only against the person doing such acts or making such statements.

The conspiracy is the offense which the conspiracy statute defines without reference to whether any crime which the conspirators have conspired to commit is actually consummated. So you must bear in mind that the charge against the defendants here in Count 1 is a conspiracy on the part of these defendants to violate the narcotic laws specified therein. They are not charged in the first count with the violation of said narcotic laws, as such, and it is not necessary for the Government

2027 to make out a charge of conspiracy under Count 1 to establish that the narcotic violations which it is alleged they conspired to commit were in fact committed.

It is not necessary in a conspiracy case for the Government to show that all the conspirators participated in it from the beginning or that all contributed alike, provided there is a common design and purpose applicable to all the conspirators at some period during the conspiracy. Some may join at an early date; others at a later date. A conspirator who knowingly enters a conspiracy after it has been in progress is bound by the acts and declarations of the other conspirators made in furtherance of the conspiracy prior to his entry therein.

It is not essential that each conspirator have knowledge of the details of the conspiracy or the means to be used or that he should know all of his fellow-conspirators. The crime may be committed whether or not the conspirators comprehend its entire scope, whether they act separately or together, by the same or different means, known or unknown to some of them, but ever leading to the same unlawful result. All conspirators need not be acquainted with each other nor need they have originally conceived or participated in the conception of the conspiracy. Those who come on later and knowingly cooperate in the common
2028 effort to obtain the unlawful results become parties thereto.

I have used the term "overt act" in connection with the discussion of conspiracy. An overt act need not be a criminal act. It may be an innocent act, standing by itself; but if it has a tendency to accomplish the purpose of the conspiracy, it is sufficient as an overt act.

The jury is instructed that as to the conspiracy count, there is no presumption that the defendants were acting in concert with each other in the offense alleged, nor is the burden upon any defendant to prove that he was not acting in concert with the others. On the contrary, before any defendant can be held responsible, the Government must prove beyond all reasonable doubt that such defendant was acting in concert with the others or some of them. If the Government has not made such proof as to any defendant or defendants, then you must find such defendant or defendants not guilty as to Count 1.

You are told that to be a member of a conspiracy a person must enter into it knowingly and intentionally. On the question of knowledge, you are told that knowledge can never be proven directly. Science has not invented any X-ray machine whereby the operations of the human mind can be photographed. Knowledge may be inferred by the jury from
2029 things done and things said by a person and from the surrounding circumstances. That is a question for the jury to determine.

In this case, if you should find that a defendant or defendants did not knowingly and intentionally participate in the conspiracy herein alleged, then they are no conspirators and should be found not guilty under Count 1 of the indictment in that event.

The failure of a person to prevent the carrying out of a conspiracy, even though he has the power to do so, will not make him guilty of the offense without further proof that he has in some affirmative way consented to be a party thereto. Neither will the commission of an overt act, though unlawful in itself, be enough to show that the actor was a party to the conspiracy. The law requires proof of the common and unlawful design and the knowing participation therein of the persons charged as conspirators before a conviction is justified.

Mere presence during the commission of a crime does not make a person a party to it, and this applies to the crime of conspiracy as well as all others. If you find a defendant did no more than witness or be present at the commission of a crime, he is not guilty.

2030 A violation of a narcotic law, if you so find, without more, does not make a defendant a conspirator, and he could not be held guilty on the first count on such evidence alone; nor does the mere association of a defendant with others, standing alone, establish membership in a conspiracy, and if you find mere association by a defendant or defendants and nothing more connecting them with the alleged conspiracy, then he or they must be acquitted.

Now, in this case, you are concerned with the specific conspiracy charged in this indictment. Before you can find that the defendants in

this case or any of them conspired as charged, you must first find from the evidence that their minds met, and that they knowingly and wilfully agreed and understood that they would follow a plan or pursue a course of conduct which if pursued would violate at least one of the narcotic statutes mentioned in Count 1.

To convict a defendant on the conspiracy count, it is necessary that you find from the evidence beyond a reasonable doubt that he knowingly and intentionally conspired with one or more of the other defendants to violate at least one of the narcotic statutes mentioned in Count 1 of the indictment as therein alleged, that he conspired to do so sometime within the period mentioned in the indictment, although it need not be the exact period mentioned therein, that at least one of the overt acts alleged in the indictment has been committed by a defendant whom you
2031 find to have been a party to the said conspiracy, and that such act was in furtherance of and to effect the object of said conspiracy, and that the conspiracy was entered into within the District of Columbia, or if not, that at least one overt act set out in the indictment was committed within the District of Columbia by a defendant who was a party to the said conspiracy.

You are told that the six defendants on trial before you deny that such a conspiracy existed. They contend with respect to Count 1 that the evidence before you does not reveal any conspiracy, but they say further that if the evidence does reveal one, it is not the one alleged in the indictment.

Should you believe from the evidence that the defendants or some of them conspired to violate the narcotic statutes but you do not believe such defendants participated in the particular conspiracy charged in Count 1, then you should find such defendants not guilty as to Count 1. In other words, if as to any defendant or defendants you find that he or they did not join or enter into the agreement or scheme or plan charged in Count 1, then he or they would be not guilty under said count; but if you find from the evidence beyond a reasonable doubt that the defendants or some of them are guilty of the conspiracy charged in Count 1, then

2032 your verdict would be guilty as to such defendants on that count.

On Count 1, the jury may find all the defendants guilty or all the defendants not guilty; or the jury may find some of the defendants guilty and others not guilty.

Now that concludes a branch of my charge, but it hasn't been finished. You have been here so long that I think I will give you another five-minute recess. Keep in mind the usual admonition.

You all may have a five-minute recess, too.

(Whereupon a short recess was taken.)

THE COURT: Bring the jury in.

(Whereupon the jurors resumed their places in the jury box.)

THE COURT: Members of the jury, besides the conspiracy count, that is, Count 1, there are twenty-one counts, numbered 2 through 22. They are referred to as the substantive counts. All of them charge violations of the narcotic laws.

2033 Narcotics have a recognized, legitimate use in medicine. On the other hand, their use when not under the supervision of a physician is regarded as dangerous and as susceptible of an evil influence. For that reason, traffic in narcotics is regulated by law so that narcotics may be available for medical purposes under the supervision of a physician but may not be obtained for illicit or illegitimate uses. Accordingly, the sale of narcotic drugs is permitted only on and pursuant to a doctor's prescription. A further safeguard is prescribed by the law in that packages containing narcotics lawfully sold and dispensed must bear an Internal Revenue stamp, and all sales of narcotics must be made in or from the original stamped package. All traffic in narcotics outside the channel prescribed by law is illicit, and because of its detrimental effect on the community is regarded as criminal.

In studying the indictment in your jury room, you will note that the substantive counts relate to transactions alleged to have taken place on or about the following dates: December 21, 1961, January the 11th, 1962, January 22, 1962, January 26, 1962, February the 8th, February 20 and February 21, all in 1962.

It is claimed that each of these seven alleged transactions violated three different laws of the United States. To be specific, as to each alleged transaction it is charged that three laws were violated. First, the statute against selling or transferring narcotic drugs except in pursuance of a written order, written for that purpose as required by

2034 law; second, the statute against selling narcotics except in or from the original stamped package; and third, the statute against a person facilitating the concealment or sale of narcotic drugs after they had, with the knowledge of said person, been imported into the United States contrary to law.

You are told that each alleged violation is set out in a separate count. This means that for each of the seven alleged transactions there are three substantive counts in the indictment.

The three narcotic laws charged in the substantive counts to have been violated are Sections 4705(a) and 4704(a) of Title 26 of the United States Code, and Section 174 of Title 21 of the same Code.

Section 4705(a) of Title 26 of the United States Code declares:

"It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given away on a form to be issued in blank for that purpose by the Secretary of the Treasury, or his delegate."

The violation to which the statute refers consists of the doing of acts which the statute declares to be unlawful, namely, selling, barter-
2035 ing, exchanging or giving away narcotic drugs, except pursuant to a written order filled out on a blank form issued by the Treasury Department.

2036 Section 4704(a) of Title 26 of the United States Code declares:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima

facie evidence of a violation of this sub-section by the person in whose possession the same may be found."

The violation to which this statute refers consists of purchasing, selling, dispensing, or distributing a narcotic drug except in or from the original stamped package.

The statute which I have just mentioned, that is Section 4704(a), speaks of the absence of appropriate tax-paid stamps which shall be prima facie evidence of a violation of Section 4704(a) by the person in whose possession the same shall be found. Now, the words prima facie mean at first sight or on first appearance. Evidence establishing beyond a reasonable doubt the possession of a narcotic drug and the absence of appropriate tax-paid stamps from said drug authorizes conviction of purchasing or selling or dispensing or distributing the drug in violation of the statute, without direct proof, either as to the fact of purchase or selling or dispensing, or distributing, or the place of same.

In other words, if it is proved beyond a reasonable doubt that a person had possession of such drug and that, while in his possession, there was no appropriate tax-paid stamps for the said drug, then those facts would constitute prima facie evidence of a violation of the statute on which a jury may find a defendant guilty on that charge, if it sees fit to do so, without requiring further proof.

Section 174 of Title 21 of the United States Code reads in pertinent part:

"Whoever knowingly facilitates the concealment or sale of any narcotic drug, after being imported or brought in, knowing the same to have been imported or brought into the United States, contrary to law," shall be punished as the law provides.

The violation to which Section 174 refers consists of knowingly facilitating the concealment or sale of a narcotic drug by a person knowing that said drug had been imported into the United States contrary to law.

Now, this law goes on to say this:

Whenever on trial for a violation of this section, the defendant is shown to have or to have had possession of the narcotic drug, such
2038 possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Despite the fact that Section 174 describes the offense as that of a person who, knowing that a narcotic drug has been imported into the United States contrary to law, knowingly facilitates the concealment or sale of said drug, nevertheless the law makes it unnecessary for the Government to offer any evidence in support of these elements provided the Government shows the accused person to have or to have had possession of the narcotic drug.

You are told that under Section 174 if the defendant is shown beyond a reasonable doubt to have or to have had possession of the narcotic drug, such possession alone would authorize conviction unless such possession is explained to the satisfaction of the jury.

The provision in Section 4704(a) about proof of the absence of appropriate tax-paid stamps and the provision in Section 174 about proof of possession do not in any manner detract from what I have said to you in respect of the presumption of innocence with which each defendant stands clothed in every criminal case, including this one, or what I have said to you in respect of the burden of proof. But if such absence of stamps
2039 or such possession of a narcotic drug be shown beyond a reasonable doubt then the burden of going forward is shifted to the defendant to rebut the presumption raised by the statute, and it becomes his burden to offer evidence to explain the absence of stamps or that he was rightfully in possession of the narcotic drug.

Your attention is now directed to Counts 2, 3 and 4. These three counts grow out of the alleged transaction of December 21, 1961.

The narcotic drug allegedly involved in Counts 2, 3 and 4, is the one which Herman H. Scott testified was sold to him by Clinton Johnson on December 21, 1961. Besides Clinton Johnson the defendant Charles Matthews is charged in Counts 2, 3 and 4, although the testimony was

that Matthews was not personally present when the sale was allegedly made to Scott.

Clinton Johnson testified, according to my recollection, that he got the narcotic drug referred to in Count 2 from Charles Matthews; that he met Matthews by appointment at 13th and Girard Streets, Northwest, and gave him \$125 for the narcotic; that Matthews told him that he -- Johnson -- was a little late for the appointment and that the narcotic had been placed in the bushes; that he -- Johnson -- picked up the narcotic from under a brown paper bag in the bushes; that Matthews
2040 saw him do that and then drove off in his car; and that he -- Johnson -- later transferred this narcotic to Scott.

This question may occur to the jury: Is it possible for a person to be guilty of an offense if he was not personally present when it was physically committed? Stated differently, is it possible for Charles Matthews to be guilty of the sale of a narcotic to Scott if Matthews was not personally present at the time of the sale?

There is a law which says that whoever aids, or abets, or counsels the commission of an offense is a principal offender. Under this law if a person aids or abets in the commission of an offense then that person is guilty of the offense even though he is not personally present at the time the offense is physically committed. In other words, such a person is just as responsible under the law as the person who commits a physical act which violates the law.

Now, the word "abet" means to encourage another to commit a crime. A person aids or abets an offender when he assists him by words or acts.

If one who aids or abets is not personally present at the time of an alleged offense, then it is necessary to prove the facts and circumstances from which the jury may infer with reasonable certainty that the person accused of aiding or abetting, did aid or abet in the alleged criminal act in such a way as to constitute him a principal under the law to which I have just referred.
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The essential elements of the offense charged in Count 2 and applicable to Charles Matthews are as follows: First, that on or about December 21, 1961, within the District of Columbia, Clinton Johnson did sell or barter or exchange or give away to Herman H. Scott, a narcotic drug, that is, a mixture totaling 7,520 milligrams of heroin hydrochloride and mannitol, second that Clinton Johnson did sell, or barter or exchange or give away said narcotic drug not in pursuance of a written order, written for that purpose, from the said Herman H. Scott, as provided by law, and third, that Charles Matthews aided or abetted the said Clinton Johnson with respect thereto.

The essential elements of the offense charged in Count 3 and applicable to Charles Matthews are as follows: First, that on or about December 21, 1961, within the District of Columbia, Clinton Johnson did purchase or sell or dispense or distribute the narcotic drug described in said count; second, that the said drug was not then and there in the original stamped package or from the original stamped package; and third, that Charles Matthews aided or abetted the said Clinton Johnson with respect thereto.

2042 The essential elements of the offense charged in Count 4 and applicable to Charles Matthews are as follows: First, that on or about December 21, 1961, within the District of Columbia, Clinton Johnson did facilitate the concealment of a narcotic drug described in said count, or the sale of said drug; second, that said drug had theretofore been imported into the United States contrary to law; third, that Clinton Johnson knowingly facilitated the concealment or sale of said narcotic drug knowing of such importation; and fourth, that Charles Matthews aided or abetted the said Clinton Johnson with respect thereto.

If, as to any of the Counts 2, 3 and 4, the jury finds that the essential elements have been established beyond a reasonable doubt, then the jury would return a verdict of guilty as to Charles Matthews as to such count or counts.

On the other hand, should the jury find that all of the essential elements have not been established as to one or more of the counts

numbered 2, 3 and 4, or you have a reasonable doubt as to whether they have, then the jury should find the defendant Charles Matthews not guilty as to such count or counts.

2043 We go now to Counts 5, 6 and 7. These three counts stem from the alleged transaction of January 11, 1962. The defendants who are accused in these counts are Doris L. Gardiner and Charles Matthews. The person to whom the defendants allegedly gave the narcotic drug mentioned in these counts is Thomas E. Broadnax, Jr. Count 5 charges that defendants Gardiner and Matthews sold or gave away a narcotic drug to Broadnax not in pursuance of the written order required by law; Count 6 charges that Gardiner and Matthews sold or gave away said narcotic drug not in or from the original stamped package; and Count 7 charges them with knowingly facilitating the concealment and sale of said narcotic drug, after its importation into the United States, contrary to law with their knowledge.

There is nothing in the evidence to indicate that Charles Matthews was personally present at the time of the alleged transaction of January 11, 1962, out of which Counts 5, 6 and 7 grow, or that he participated in the alleged physical act constituting the offenses charged. I shall now discuss the theory on which Matthews is charged with Doris Gardiner in these counts, 5, 6 and 7.

2044 You are told that a party to a continuing conspiracy may be responsible for substantive offenses committed by a co-conspirator in furtherance of the conspiracy, even though he does not participate in the substantive offenses or have any knowledge of them. This is because, while a conspiracy continues, the members of the conspiracy act for each other in carrying forward or promoting the aims of the conspiracy.

It is the contention of the Government that Matthews was a conspirator, as charged in Count 1, and that the substantive offenses set forth in Counts 5, 6 and 7, and allegedly committed by Doris Gardiner were in furtherance of and a part of the conspiracy charged in the first count. So the Government claims that Matthews should be found guilty along with Doris Gardiner as to Counts 5, 6 and 7.

Of course, when you take up Counts 5, 6 and 7 you are to consider each separately. I shall indicate how you are to proceed in respect of Count 5, and when you have concluded your consideration of Count 5, you will proceed in the same way to consideration of Count 6 and then Count 7.

Should the jury find beyond a reasonable doubt that as to Count 5 all of the essential elements, which I shall later give you, have been established as to Doris Gardiner, the jury would then return a verdict of guilty as to her as to that count.

If you so conclude as to Doris Gardiner as to Count 5, and if from the evidence you further conclude beyond a reasonable doubt that Charles Matthews was a party to the conspiracy charged in the first count, and that the acts of Doris Gardiner charged in Count 5 were committed in furtherance of the conspiracy charged in the first count and as a part thereof and to effect its objects, then your verdict as to Charles Matthews under Count 5 would be guilty.

Should you find Charles Matthews not guilty on the conspiracy count, then you must find him not guilty on Count 5.

Doris Gardiner, if you find the evidence justifies it, can be found guilty on Count 5, even though found not guilty on the conspiracy count, provided you find that the essential elements of the offense charged in Count 5 have been established as to her beyond a reasonable doubt.

If, as to Count 5, you believe that Doris Gardiner is innocent, or if you find that any of the essential elements of the offense charged in that count have not been established beyond a reasonable doubt as to her, then you would find her not guilty as to Count 5. Naturally, if Doris Gardiner is found not guilty as to Count 5 it would follow that your verdict as to Charles Matthews would be not guilty on that count.

When the jury makes its determination as to the guilt or innocence of defendants Charles Matthews and Doris Gardiner with regard to Count 6, it is to do so by applying the same principles stated by me in regard to Count 5. The same is to be done in respect of Count 7.

2046 In Counts 8, 9 and 10 the defendants accused are Norman Pannell, Valeria Pannell, Charles Matthews, Ellen M. Phelps, and Roland R. Henry.

The laws they are charged with having violated in Counts 8, 9 and 10 are the same laws alleged to have been violated in Counts 5, 6 and 7.

The narcotic drug allegedly involved in Counts 8, 9 and 10 is the one which Herman H. Scott testified he received from Norman Pannell at 1246 Holbrook Terrace on January 22, 1962.

It is the contention of the Government that Valeria Pannell aided and abetted Norman Pannell in respect of each offense charged in Counts 8, 9 and 10. The jury will recall that Herman H. Scott testified that Valeria Pannell was personally present when the narcotic drug referred to in Counts 8, 9 and 10 was given to him by Norman Pannell, and that certain things were said and done by her.

There is nothing in the evidence to indicate that Charles Matthews, Ellen M. Phelps, and Roland R. Henry were personally present at the time of the alleged transaction of January 22, 1962, out of which Counts 8, 9 and 10 grow, or that any of them participated in the alleged physical act constituting the offenses charged.

2047 It is the contention of the Government that Charles Matthews, Ellen M. Phelps, and Roland R. Henry are members of the conspiracy charged in Count 1, and that the substantive offenses set forth in Counts 8, 9 and 10 and allegedly committed by Norman Pannell and Valeria Pannell were in furtherance of and a part of the conspiracy charged in the first count. So the Government claims that Matthews, Mrs. Phelps and Roland R. Henry should be found guilty along with Norman Pannell and Valeria Pannell as to Counts 8, 9 and 10.

The procedure the jury is to follow in respect of each of the Counts 8, 9 and 10 is the same. You are to take up the counts one by one, and consider first the defendant Norman Pannell.

As to Count 8, should the jury find beyond a reasonable doubt that as to the offense therein charged all of the essential elements, which I shall later give you, have been established beyond a reasonable doubt

as to Norman Pannell, the jury would then return a verdict of guilty as to him as to Count 8.

If you so conclude as to Norman Pannell as to Count 8, and if you should further find beyond a reasonable doubt that Valeria Pannell either aided or abetted Norman Pannell in the commission of the offense charged therein or that she was a member of the conspiracy charged in Count 1,

2048 and that Norman Pannell's acts charged in Count 8 were in furtherance and as a part of such conspiracy, and to effect its objects, then your verdict as to Count 8 as to Valeria Pannell would be guilty.

If the jury is satisfied from the evidence beyond a reasonable doubt that Norman Pannell committed the offense charged in Count 8, and if the jury further believes from the evidence beyond a reasonable doubt that at the time this particular offense was committed by Norman Pannell, that the conspiracy charged in Count 1 existed and that Norman Pannell was a member thereof, then the jury would have the right to convict under Count 8 any of the defendants Matthews, Phelps and Henry, whom the jury finds beyond a reasonable doubt were likewise members of such conspiracy, provided the acts of Norman Pannell referred to in Count 8 were in furtherance and a part of the said conspiracy and you so find beyond a reasonable doubt.

Should you find any of the defendants Charles Matthews, Ellen M. Phelps and Roland R. Henry not guilty on the conspiracy count, then those found not guilty on that count must be found not guilty on Count 8.

Norman Pannell, if you find the evidence justifies it, can be found guilty on Count 8 even though found not guilty on the conspiracy count,
2049 provided you find that the essential elements of the offense charged in Count 8 have been established as to him beyond a reasonable doubt.

Likewise, Valeria Pannell, if the evidence justifies it, can be found guilty on Count 8, even though found not guilty on the conspiracy count, provided you find that the essential elements of the offense charged in Count 8 have been established as to Norman Pannell beyond a reasonable doubt, and you further find beyond a reasonable doubt that Valeria Pannell aided or abetted in the commission of said offense.

If, as to Count 8, you believe that Norman Pannell is innocent, or if you find that any of the essential elements of the offense charged in that count have not been established beyond a reasonable doubt, you would then find him not guilty as to Count 8. Naturally, if he is found not guilty as to Count 8 it would follow that all the others named with him in that count would be found not guilty.

When the jury makes its determination as to the guilt or innocence of the defendants in each of the Counts 9 and 10 it is to do so by applying the same principles stated by me in reference to Count 8.

We reach now the Counts numbered 11 through 22. Counts 11, 12 and 13 stem from the alleged transaction of January 26, 1962, Counts 14, 15 and 16 from the alleged transaction of February 8th, 1962, Counts 17, 18 and 19 from the alleged transaction of February 20, 1962, and Counts 20, 21 and 22 from the alleged transaction of February 21, 1962. The defendants accused in the Counts 11 through 22 are Doris Gardiner, Charles Matthews, Ellen M. Phelps and Roland R. Henry. As to each of these alleged transactions Thomas Broadnax is named as the person to whom a narcotic drug was allegedly sold or given away. It is charged that each transaction violated three different narcotic laws, namely, the law against selling or transferring narcotic drugs except in pursuance of a written order as required by law, the law against selling narcotic drugs except in or from the original stamped package, and the law against a person knowingly facilitating the concealment or sale of narcotic drugs after they had, with the knowledge of such person, been imported into the United States contrary to law.

In the testimony of Thomas Broadnax he said that Doris Gardiner sold the narcotic drugs to him which are referred to in Counts 11 through 22. There is nothing in the evidence to indicate that the other defendants named in these counts were personally present at the time of the alleged offenses or that they participated in the alleged physical acts constituting the offenses charged.

The Government contends that Charles Matthews, Ellen Phelps, and Roland Henry were members of the conspiracy charged in Count 1,

and that the substantive offenses set forth in Counts 11 through 22 and allegedly committed by Doris Gardiner were in furtherance of and as a part of the conspiracy charged in the first count. So the Government claims that Matthews, Mrs. Phelps and Roland Henry should be found guilty along with Doris Gardiner as to Counts 11 through 22.

You are to take up one by one the Counts 11 through 22, and consider first the defendant Doris Gardiner.

As to Count 11, should the jury find beyond a reasonable doubt that as to the offense therein charged all of the essential elements thereof, which I shall later give you, have been established against Doris Gardiner, then the jury would return a verdict of guilty as to her as to Count 11.

Before you may find any of the defendants Charles Matthews, Mrs. Phelps and Roland Henry guilty of the offense charged in Count 11, you must first find that the essential elements, which I shall later give you, have been established beyond a reasonable doubt as against Doris Gardiner in respect of said count.

2052 And then, if you so conclude, you must then find, before you may find one or more of the defendants, Matthews, Phelps and Henry guilty, that he or they were parties to the conspiracy charged in the first count, and that the acts of Doris Gardiner charged in Count 11 were committed in furtherance of such conspiracy and as a part of it.

Therefore, except for Doris Gardiner, no defendant accused with her in Count 11 can be found guilty as to Count 11 unless you find such defendant guilty on Count 1. Should you find any such defendant not guilty on Count 1, the conspiracy count, then you must find him not guilty as to Count 11.

Doris Gardiner, if you find the evidence justifies it, can be found guilty on Count 11, even though found not guilty on the conspiracy count, provided you find that the essential elements of the offense charged in Count 11 have been established in respect of her beyond a reasonable doubt.

If, as to Count 11, you believe that Doris Gardiner is innocent, or if you find that any of the essential elements of the offense charged in that count have not been established beyond a reasonable doubt, you would then find her not guilty as to Count 11. Naturally, if she is found not guilty as to Count 11 it would follow that all the others named with her in that count would be found not guilty.

2053 When the jury makes its determination as to the guilt or innocence of the defendants as to Count 11, then the jury would proceed to consider separately each of the remaining Counts 12 through 22, applying thereto the same principles stated by me in reference to Count 11.

When I was discussing Counts 2, 3 and 4 as to Charles Matthews, I made no reference in that connection to the conspiracy count. You are told this:

Charles Matthews, if you find the evidence justifies it, can be found guilty as to Counts 2, 3 and 4 even though found not guilty on the conspiracy count, provided you find that the acts charged in Counts 2, 3 and 4, as to Clinton Johnson have been established beyond a reasonable doubt, and you further find beyond a reasonable doubt that Charles Matthews aided or abetted in the commission of the offenses charged in such counts as I have explained the terms aiding and abetting to you.

Your verdict in respect of each defendant as to each charge in the substantive counts may be guilty or not guilty.

I shall now discuss aspects of your treatment of the evidence in regard to certain substantive counts.

2054 You are told that if you find the conspiracy charged in Count 1 of the indictment has not been established, then with regard to each of the substantive counts 5 through 22 you must determine the guilt or innocence of each defendant charged thereunder solely on the evidence produced with respect to that defendant, that is to say, on any evidence as to what such defendant said, and what he himself did; and you may consider testimony as to any conversations which occurred in his presence.

However, if you should find from the evidence that the conspiracy charged in Count 1 did exist, then you would proceed as to each of the substantive Counts 5 through 22 as follows: You would, of course, take up each of these counts separately and determine whether or not the offense charged in the count was in fact committed.

If you should find that the offense charged therein was in fact committed, you would then consider whether or not it was committed in furtherance of said conspiracy and fell within the scope of the unlawful agreement, and could reasonably be foreseen as a necessary and natural consequence of it.

If you should find that the offense charged in the count was committed, but that it was not committed in furtherance of the conspiracy, then you would have to determine the guilt or innocence of each defendant charged in the count solely on the basis of the evidence produced with respect to that defendant.

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But if, on the other hand, you should find that the offense charged in the count was committed, and that it was committed in furtherance of said conspiracy and fell within the scope of the unlawful agreement, and could reasonably be foreseen as a necessary or natural consequence of it, then, in determining the guilt or innocence of the defendants charged in said count you could consider the acts and declarations of any defendant whom you find was a member of the conspiracy against any other defendant whom you also find to have been a member of the conspiracy, provided, of course, that said acts and declarations were in furtherance of said conspiracy.

You are instructed that testimony or other evidence admitted only to apply as to a specified defendant may only be considered by you as to that defendant and none other.

There has been testimony in this case involving the possible commission by some of the defendants of offenses other than those charged in the indictment.

It is my recollection that Thomas Broadnax testified that he saw the defendant Doris Gardiner putting white powder into capsules. It is also my recollection that Clinton Johnson testified that one of his suppliers was the defendant Gatemouth or Charles Matthews. The indictment contains no charge based specifically on this alleged act of Doris Gardiner, nor does it contain any charge

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as to alleged dealings between Clinton Johnson and Charles Matthews prior to December 21, 1961. Such testimony was admissible only insofar as it might tend to show a plan by the aforesaid defendant to commit the offenses with which they are charged in the indictment. And such testimony is not to be considered by you for any other purpose.

It is also my recollection that Herman Scott testified that in a conversation he had with the defendants Valeria and Norman Pannell they stated, in connection with an alleged attempt to purchase

heroin from Matthews, that they had been dealing with Gatemouth regularly. The indictment contains no charge based on the alleged dealings between the Pannells and Matthews just referred to, but such testimony may be considered for the purpose just explained to you.

However, you are further told that in considering this aforesaid testimony of Scott as to what the Pannells said you may consider it with reference to the defendants Norman and Valeria Pannell, but you may not consider it as to the defendant Charles Matthews unless you first find that the conspiracy charged in Count 1 of the indictment has been established, and that the defendant Charles Matthews was a member of such conspiracy, and that the aforesaid alleged statements of the Pannells, as to which Scott testified,

2057 were made in furtherance of said conspiracy.

Naturally, if you find that statements of the Pannells, as related by Scott, were made and were made in furtherance of a conspiracy as charged in Count 1, then such statement or statements would be admissible as to all other defendants whom you may find were members of the conspiracy.

Each of the six defendants on trial before you has pled not guilty.

Moreover, the defendants Doris Gardiner, Norman Pannell, and Valeria Pannell claim that they should be found not guilty even if the jury should believe that the transactions did occur which are charged against them in the indictment. This is because, so they claim, such transactions resulted from their being entrapped. On the other hand, the Government denies that any of these defendants were entrapped.

If a person is entrapped, then that person cannot be found guilty of the offense which was the product of the entrapping.

You are told that under the instructions of the Judge on the subject of entrapment and on the evidence in the case, the jury is

to evaluate the claim of Doris Gardiner that she was entrapped, and also the claim of Norman Pannell and Valeria Pannell that they were entrapped. The jury is to make the decision as to whether there was or was not entrapment.

2058 In the eyes of the law entrapment has a peculiar meaning. What is meant by entrapment will now be explained to you.

Entrapment is the conception and planning of an offense by a Government officer, and his procurement of its commission by a person who would not have perpetrated the offense except for the trickery, persuasion or fraud practiced by the officer for entrapment purposes. To state the matter differently, entrapment occurs where a law officer conceives in his mind a crime, plans and activates its commission by a person not theretofore intending its perpetration.

The Supreme Court of the United States, some years ago, said on the question of entrapment:

"It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design, to

2059 expose the illicit traffic, the illegal conspiracy, or other offense and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of a person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

2060 You are instructed that there could be no entrapment if the defendant was already disposed to such wrongdoing as charged by the indictment and was awaiting only an advantageous and apparently

safe opportunity. Such disposition or its absence may be evidenced in various ways, including response to a particular request and in some situations by a revealing recent course of conduct or activity.

You are instructed that if an officer puts into the mind of someone else that he should commit a crime when that idea was not in that person's mind until it was so placed and that person commits the crime although he had no pre-existing disposition to do so, he cannot be convicted if the officer who placed that thought into his mind does it for the purpose of entrapment.

You are instructed that there is no legal entrapment if government officials induced the commission of a crime provided the inducement was no more than one instance of the kind of conduct in which the accused was prepared to engage and the prosecution has not seduced a person who had no pre-existing disposition to such conduct but has only provided the means for the accused to realize his pre-existing purpose. Proof of this may be by evidence of the accused's recent past conduct, of his or her preparation or of his or her ready compliance or willingness to act.

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You are further instructed that it is essential for the defense of entrapment to prevail that the officer who places the thought of committing the crime into the mind of the defendant does so for the purpose of entrapping him and not for any other purpose. In other words, there is no entrapment if an officer of the law induces a person to commit a crime not for the purpose of entrapping him but for a purpose personal to the officer and not connected with his law enforcement.

The defense of entrapment having been raised in this case as to the defendant Doris L. Gardiner, you are instructed that if you find from the evidence that the defendant Gardiner had no intention or willingness to commit the offense with which she is charged and that the criminal design originated with Joseph Jackson, and that Joseph Jackson implanted in the mind of this defendant the disposition to commit the offenses with which she is charged and induced the

commission of the offenses for the purpose of entrapment, then you are to find the defendant not guilty. However, if you find that the defendant had the disposition to commit the offenses with which she is charged and that Joseph Jackson merely afforded her an opportunity to commit these offenses, then the defense of entrapment will not excuse the defendant's acts.

2062 If you have a reasonable doubt as to whether there was entrapment of the defendant Gardiner as to an offense or offenses charged, then your verdict should be not guilty as to such offense or offenses.

On the other hand, you are instructed that if you find beyond a reasonable doubt that the criminal design originated with the defendant Gardiner and not with Joseph Jackson, that Joseph Jackson merely afforded the defendant the opportunity for commission of the offenses charged, and that Doris Gardiner intended or was willing to commit such offenses, then there was no entrapment, and if as to such defendant the charge in the indictment against her or some of such charges have been established by the evidence beyond a reasonable doubt, then you are to find such defendant guilty as to such charge or charges.

It has been brought out in this case that Doris Gardiner has a criminal record for previous narcotic violations. Now that does not disqualify her from interposing the defense of entrapment. But her criminal record in connection with narcotic violations may be considered by the jury in its determination of whether in the case here she had a predisposition or willingness to commit the offenses with which she is charged.

2063 If in this case the jury should find that there was entrapment of Doris Gardiner as to the first or initial offense here charged as to her, then you are told that the entrapment defense would apply also to later offenses charged against such defendant if you further find that such later offenses were part of a course of conduct

which was the product of entrapment in such first or initial offense.

Concerning the one transaction allegedly involving the Pannells, it is my recollection that there was only one witness, Herman H. Scott. So it is to his testimony that the jury is to look as to the claim of entrapment by the Pannells.

You may consider all the circumstances shown by the testimony pertaining to the alleged transaction, what the defendants said on that occasion, and whether what they said did or did not tend to indicate a predisposition on their part to deal in narcotics.

The jury is told that courts recognize and set up protection against entrapment only for a defendant or defendants who have no pre-existing disposition, intention, or willingness to commit the crime or crimes with which they are charged.

Intent is a state of mind with which an act is done. It is the mental process, the design, the aim, the purpose or object of the act.

Should the jury find that the Government employee, Herman H. Scott, in dealing with the Pannells did bring about the commission by those defendants of an offense or offenses charged in the indictment but that they intended or were ready and willing without

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persuasion to commit such offenses, and were awaiting only an advantageous and apparently safe opportunity to do so, then, and in that event, the claim of entrapment would not have been established as to such defendants. And if as to such defendants one or more of the offenses charged against them have been established by the evidence beyond a reasonable doubt, then you would find such defendants guilty as to such offense or offenses.

On the other hand, the jury is instructed that if you should find from the evidence that the Pannells had no disposition, intention or willingness to commit the offenses with which they are charged, and that the Government employee induced the commission of the offenses for the purpose of entrapment, then you are to find such defendants not guilty as to such offenses.

If the jury has a reasonable doubt as to whether there was entrapment of the Pannells as to the offenses charged against them, then your verdict would be not guilty as to such offense or offenses.

Each crime charged in the indictment in this case has certain essential elements.

2065 You cannot convict a defendant of a crime charged unless you have first found from the evidence that as to him or her each and all of the essential elements of such crime have been established beyond a reasonable doubt. If, as to any crime charged against a defendant, you find that one or more of the essential elements thereof have not been established beyond a reasonable doubt, then it would be your duty to acquit that defendant as to such offense. I have already stated the essential elements as to counts 2, 3 and 4. I shall now state the essential elements as to each of the other offenses charged.

The essential elements of the offense charged in the first count, that is, the conspiracy count, and applicable to each defendant, are the following:

First: That he knowingly and intentionally conspired, as I have defined that term to you, with one or more of the defendants to violate one or both of the narcotic statutes mentioned in Count one, and that the conspiracy was a continuing one.

Second: That one or more of the overt acts alleged in the indictment have been committed during the conspiracy by the defendant under consideration or by a defendant or defendants with whom you find he conspired, and that such overt act or acts were in furtherance of and to effect the object of the conspiracy.

2066 Third: That such conspiracy was entered into at a time within the period named in the indictment, and within the District of Columbia, and that one or more of said overt acts you find to have been committed were committed within the District of Columbia.

The essential elements as to each of the Counts 5, 11, 14, 17, and 20, and applicable to the defendant Doris Gardiner, and as to Count 8 applicable to the defendant Norman Pannell, are the following:

First: That on or about the date mentioned in said count, and within the District of Columbia, the defendant sold or gave away to a person specified in said count a narcotic drug described therein.

Second: That said defendant sold or gave away said narcotic drug not in pursuance of a written order on a form issued in blank for that purpose, as required by law, from the person to whom said defendant sold or gave away said narcotic drug.

That concludes the essential elements as to the defendant Doris Gardiner in respect of each of the Counts 5, 11, 14, 17, and 20, and as to the defendant Norman Pannell with regard to Count 8.

You will recall that Thomas Broadnax is specified as the person to whom Doris Gardiner allegedly sold or gave away a narcotic drug in each of the Counts 5, 11, 14, 17, and 20, while Herman H. Scott is specified as the person to whom Norman Pannell allegedly sold or gave away a narcotic drug in Count 8.

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The evidence does not show that certain defendants accused in these same counts were personally present at the time the offenses therein were allegedly committed or that they were connected with the alleged physical acts of violating the law. I shall now discuss such defendants.

The essential elements applicable to the defendant Charles Matthews as to Count 5, and applicable to each of the defendants Charles Matthews, Ellen H. Phelps, and Roland R. Henry as to each of the Counts 11, 14, 17, and 20, are that the defendant under consideration was a party to the conspiracy charged in the first count; that each of the essential elements applicable to Doris Gardiner as to the particular count under consideration have been established beyond a reasonable doubt; and that the acts of Doris Gardiner,

charged in said counts, were in furtherance of and as a part of such conspiracy and to effect its objects.

The essential elements of Count 8 applicable to each of the defendants Charles Matthews, Ellen H. Phelps, and Roland R. Henry are that the defendant was a party to the conspiracy charged in the first count, that each of the essential elements of Count 8 applicable to Norman Pannell have been established beyond a reasonable doubt, and that Norman Pannell's acts, charged in Count 8, were in furtherance of and as a part of such conspiracy and to effect its objects.

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The essential elements as to each of the Counts 6, 12, 15, 18, and 21, applicable to the defendant Doris Gardiner, and as to Count 9, applicable to the defendant Norman Pannell, are the following:

First: That the defendant, on or about the date named in the particular Count under consideration, within the District of Columbia, did purchase or sell or dispense or distribute the narcotic drug described in said count.

Second: That the said narcotic drug was not then and there in the original stamped package or from the original stamped package.

These are the essential elements applicable to Doris Gardiner as to each of the Counts 6, 12, 15, 18, and 21, and applicable to Norman Pannell as to Count 9.

The essential elements applicable to the defendant Charles Matthews as to Count 6 and applicable to each of the defendants Charles Matthews, Ellen H. Phelps, and Roland R. Henry as to each of the Counts 12, 15, 18, and 21, are that the defendant was a party to the conspiracy charged in the first count, that each of the essential elements applicable to Doris Gardiner as to the particular count under consideration have been established beyond a reasonable doubt, and that the acts of Doris Gardiner charged in that count, were in furtherance of and as a part of said conspiracy and to effect its objects.

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The essential elements of Count 9 applicable to each of the

defendants Charles Matthews, Ellen H. Phelps, and Roland Henry are that the defendant was a party to the conspiracy charged in the first count; that each of the essential elements of Count 9 applicable to Norman Pannell have been established beyond a reasonable doubt; and that Norman Pannell's acts, charged in Count 9 were in furtherance of and as a part of such conspiracy and to effect its objects.

Counts 6, 9, 12, 15, 18 and 21, which I have just been discussing, each charge a violation of Section 4704(a) of Title 26 of the United States Code. You are to keep in mind as to each of these counts the provision of the law that the absence of appropriate tax paid stamps on narcotic drugs shall be prima facie evidence of a violation of Section 4704(a) by the person in whose possession said drugs are found. You are told that as to each of Counts 6, 9, 12, 15, 18, and 21, if it be proved beyond a reasonable doubt that a defendant therein charged had possession of a narcotic drug and that while in his possession there were no appropriate tax paid stamps for that drug, then those facts constitute prima facie evidence of a violation of Section 4704(a) and the jury may find the defendant guilty of that charge if it sees fit to do so without requiring further proof.

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The essential elements as to each of the Counts 7, 13, 16, 19, and 22, applicable to the defendant Doris Gardiner, and as to Count 10 applicable to the defendant Norman Pannell, are the following:

First, that on or about the date mentioned in said Count, and within the District of Columbia, the defendant did facilitate the concealment or sale of a narcotic drug described in said count.

Second, that said narcotic drug had theretofore been imported into the United States contrary to law.

Third, that said defendant knowingly facilitated the concealment or sale of such narcotic drug knowing of such importation.

Charles Matthews is charged in each of the counts 7, 10, 13, 16, 19 and 22, and Ellen H. Phelps and Roland R. Henry are likewise charged in each of these counts except Count 7.

The essential elements applicable to the defendant Charles Matthews as to Count 7, and applicable to each of the defendants Charles Matthews, Ellen H. Phelps, and Roland R. Henry as to each of the Counts 13, 16, 19, and 22, are that the defendant was a party to the conspiracy charged in the first count, that each of the essential elements applicable to Doris Gardiner as to the count under consideration have been established beyond a reasonable doubt, and that the acts
 2071 of Doris Gardiner, charged in that count, were in furtherance of and as a part of such conspiracy and to effect its objects.

The essential elements of Count 10 applicable to each of the defendants Charles Matthews, Ellen H. Phelps, and Roland R. Henry are that the defendant was a party to the conspiracy charged in the first count, that each of the essential elements applicable to Norman Pannell as to Count 10 have been established beyond a reasonable doubt, and that the acts of Norman Pannell charged in that count, were in furtherance of and as a part of such conspiracy and to effect its objects.

Counts 7, 10, 13, 16, 19, and 22, which I have just been discussing, each charge a violation of Section 174 of Title 21 of the United States Code. You are to keep in mind as to each of these counts the provisions of the law that whenever a defendant is on trial for a violation of Section 174 and such defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

As I have explained to you before, despite the fact that Section 174 describes the offense as that of a person who, knowing that a narcotic drug has been imported into the United States contrary to law, knowingly facilitates the concealment or sale of said drug,
 2072 nevertheless the law makes it unnecessary for the Government to offer any evidence in support of these elements provided the Government shows the accused person to have or to have had possession of said narcotic drug and does so beyond a reasonable doubt.

As to Valeria Pannell, the essential elements in respect of each of the Counts 8, 9, and 10 are as follows: That each of the essential elements applicable to Norman Pannell as to the particular count under consideration have been established beyond a reasonable doubt; that Valeria Pannell either aided and abetted Norman Pannell in the commission of the offense charged in said particular count or that she was a member of the conspiracy charged in the first count, and that Norman Pannell's acts charged in the particular substantive count under consideration were in furtherance of and as a part of such conspiracy and to effect its objects.

Now, as to each defendant, you are instructed again that if you find that each and all of the essential elements of one or more counts have been established beyond a reasonable doubt in respect of him or her, your verdict would be guilty as to such person on such count or counts.

2073 As to each defendant you are further instructed that if you find that any of the essential elements on one or more counts have not been established beyond a reasonable doubt, or if you believe the defendant innocent thereof, your verdict would be not guilty as to him on such count or counts.

Members of the jury, you have been very patient. This charge is taking a very long time and much longer than I like, but it seemed impossible to shorten it in view of the number of defendants and the number of counts that are involved and the number of points that have had to be covered, but I am almost through.

You will recall that there were instances and times during the trial that the Court excluded or struck from the record certain testimony, and in other instances the Court sustained the objection of counsel to certain questions that had been put to various witnesses. In regard to the testimony of witnesses that was excluded or stricken, you are to treat the same as if you did not hear it. Excluded testimony is not evidence. The same is true regarding testimony to which the Court sustained an objection.

Where the Court did not permit the witnesses to answer a pending question and did not admit a certain document in evidence, you are not to guess as to what the testimony would have been if the witness had been permitted to answer the question, nor may you guess as to the contents of any exhibit that was not admitted as evidence.

2074

The Jury is to take care not to consider as evidence any expression of the Judge made during the course of the trial and to draw no inference against a defendant from anything said or done by the Judge at any stage of the case, as such impression was not intended to be conveyed.

The function of the Judge is to instruct you as to the law. You and you alone are the sole judges of the facts and the inferences to be drawn from them. You are to disregard any colloquy between counsel and the Judge as that is not evidence at all and relates solely to matters of law, with which you are not concerned.

And you are told this: That what the attorneys in a case say is not evidence. What the attorneys have said in their arguments is entitled to your careful consideration insofar as you find it logical and in accord with the evidence and reasonable. But as I said, what they say is not evidence in the case and if your recollection differs from theirs, then it is your recollection of the evidence by which you are to be guided.

You are to keep in mind, too, that each attorney represents his particular side of the case. You, however, are judges of the facts, and impartiality is expected of you, just as it is expected of the Judge.

2075

Now, I have very briefly commented on some of the evidence, but in doing so I want you to understand that it was for the sole purpose of explaining certain propositions of law which I have stated and to assist you in understanding the issues involved in this case which you are called upon to determine.

And if, in commenting on the evidence, I stated something to be a fact or I stated something to be in the evidence which according

to your recollection is not the case, then it is your recollection that you are to take into account and not mine because what I say is not evidence.

And be sure, that in commenting on the evidence, you understand that I am not attempting to usurp your function as the sole judges of the facts in this case.

Now, when you come to consider the instructions which I have given you in this charge, you are to consider the instructions as a whole. You are not to pick out some particular portion and accentuate that and overlook others, but you are to consider them all together in their entirety.

In order for the jury to reach a verdict as to any defendant under any count the verdict of the jury must be unanimous. When the jury goes to the jury room, the first thing you are to do is elect your foreman, and after your foreman is elected the foreman will give each and every one of you an opportunity to express your views and each of you should listen to the views expressed by the other jurors.

2076 Are there any objections or requests?

MR. SMITHSON: No objections. No suggestions.

2077 (AT THE BENCH:)

MR. SHORTER: May we be heard?

THE COURT: You may.

MR. SHORTER: Your Honor, I would object to the failure of the Court to give defendants' instructions as drawn and in the instances where the subject matter of our instructions were not given at all we object to the failure to give the substance of these instructions.

The next one is, in discussing the elements of the offense charged in Count 1, when Your Honor was telling the jury how to determine whether a particular defendant joined the conspiracy, Your Honor mentioned knowledge is one of the essentials that must be found in respect of a particular defendant and said knowledge

may be proved directly or indirectly. I would move the Court to add evidence of knowledge as an element must be clear and unequivocal.

I next object to the Court's instruction on the subject of the way the jury is to view the testimony of Clinton Johnson in light of the fact he is an accomplice.

THE COURT: I don't understand your objection there. What do you have in mind?

MR. SHORTER: You have given your accomplice rule as applies to Johnson and in the circumstances of this case I move you further instruct the jury that recollection is further corroboration

2078 and if they find none they acquit Matthews on the count Clinton Johnson gave testimony on.

Finally, I would object to the Court giving the indictment to the jury as drawn. There are averments of overt acts contained therein which are not proved.

Thank you.

MR. MITCHELL: I join in that. That is all.

MR. FIRST: I have one comment on the instructions. Your Honor did not mention there was no presumption of guilt in the case of Valeria Pannell on the substantive charges because she did not have possession of it.

THE COURT: I don't have to tell them that. I told them about the presumption of innocence.

MR. JOHNSON : I haven't anything.

THE COURT: I am surprised at that.

(IN OPEN COURT:)

2079 THE COURT: When the jury goes to the jury room I am going to excuse the two alternates and I thank the two alternates very much for their service, as I do all of the other jurors. I will now ask the two alternate jurors to step out of the box and be seated in the court room.

(The alternate jurors left the jury box and were seated in the court room.)

I will now ask the Marshal to hand each member of the jury a copy of the indictment.

(The Marshal handed copies of the indictment to the jurors.)

What is being handed to you now is a copy of the indictment, one copy for each of you.

Would counsel like to see the copies of the papers that are being handed out?

MR. SMITHSON: I have no desire to.

MR. SHORTER: Your Honor, we are certain it comports to the indictment as drawn.

MR. JOHNSON: We don't have any desire.

2080 THE COURT: I would like for counsel to look at the paper on which they are to write their verdicts and to keep this paper with them all the time. That indictment is for your information of what the charges are. This paper which I am now holding up is the paper on which you are to put your verdicts. It names each defendant, over here on this side, and then it has a space for each count with the number above it, in which a defendant is named.

Then, when you have a defendant who is not named in some of the counts those counts that a defendant is not named in, the space is x'd out.

Suppose you gentlemen look at this and then I will ask the Clerk to pass one copy to each juror.

(Counsel looked at the form.)

I will ask the Clerk now if he will give a copy to each member of the jury.

(The forms were passed among the jurors.)

I would like to see counsel at the bench.

2081 (AT THE BENCH:)

THE COURT: I am planning to have this jury stay here for awhile and go to dinner and maybe deliberate until 10:00 o'clock.

I don't want to keep you all around here. I don't imagine they would have reached a verdict by 10:00 o'clock.

MR. MITCHELL: I am glad to.

MR. JOHNSON: I think it is an excellent idea.

THE COURT: I will give them some general instructions.

MR. SMITHSON: Does Your Honor propose to keep them overnight?

THE COURT: Yes.

2081(a)

(IN OPEN COURT:)

THE COURT: Members of the jury, I would like to have your attention for a moment. You are told this: Except when all twelve of you are assembled together in the jury room you are not to discuss this case.

In other words, if you take a recess and some of the jurors are not back yet in the jury room, you are to wait until all twelve are there.

I don't know who you will select as your foreman but your foreman is directed to see to it that there is no discussion of this case anywhere at any time until all twelve of you are assembled in the jury room together and you are to keep that admonition in mind at all times.

Outside of the jury room a Marshal will be placed and any time you want to get in touch with the Judge you may make that known to the Marshal.

I might say to you I know it is late. This case has been a long case and although you have had a long day I want you to stay and deliberate awhile this evening. I have made arrangements for you to be taken by the Marshal to dinner. Of course, there is to be no discussion of the case while you are at dinner. All of your discussions are to be in the jury room when all twelve of you are there together.

I think it is better for you to stay here at the court house

2082

until your decision is finally reached.

If you have any messages you want sent to your friends or relatives about your being here and not being able to get home, if you will give the message to the Marshal I will then look it over and have it sent for you. Also, it may be that some assistance can be given you in the way of getting any supplies you need in the way of tooth brushes and tooth paste.

You may now retire and give to this case your conscientious consideration just as you would any matter of importance in your life.

You may retire.

The Marshal reminded me, he asked me if I told you that your verdict had to be unanimous. I think I did. Each defendant, as to each count has to be unanimous. That is, all twelve of you must agree to it.

You may now go.

(Thereupon, at approximately 5:30 P.M. the jury retired to commence deliberations.)

MR. SHORTER: We are wondering about the defendants. Can they go?

THE COURT: I don't think the jury will reach a verdict tonight.

2083

MR. SMITHSON: They might later this evening. It is surprising. Sometimes they get expeditious.

THE COURT: Would you like to have them go for a certain specified period of time? They are going immediately to dinner.

MR. SHORTER: I would think they would be back about 7:30.

MR. SMITHSON: About quarter of eight.

THE COURT: You wouldn't need your people until eight o'clock.

MR. SHORTER: I will let the Clerk know where Mr. Mitchell and I are and the defendants will be with us.

THE COURT: Counsel are excused until 8:00 o'clock.

(Thereupon, at approximately 5:32 P.M. the trial of the above case was adjourned until return of Court.

[Filed Oct. 10, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)	
vs.)	Criminal No. 289-62
CHARLES MATTHEWS, ET AL)	

DEFENDANT MATTHEWS' PRAYER FOR INSTRUCTION
No. 5

In further regard to the testimony of the witness Clinton Johnson, you will recall that it was proved (1) that he has a poor criminal record; (2) that he believes that he would personally benefit by testifying for the Government in this case. These facts affect the weight you should give to Johnson's testimony.

[Denied /s/Matthews, Judge]

U. S. v. Rainone, 192 F 2d 861.

[Filed Oct. 10, 1962]

DEFENDANT MATTHEWS' PRAYER FOR INSTRUCTION
No. 6

The witness Clinton Johnson who testified in this case for the Government was also charged as a defendant in this case. He was charged in count one of this indictment, which charges the conspiracy; and was also named as a defendant in counts 2, 3 and 4 of the indictment. These latter named counts arise from the sale of one-half ounce of heroin by him to Agent Scott on December 21, 1961. You recall the testimony of the agent and of Mr. Johnson himself regarding this occurrence, and the fact that Johnson has admitted his guilt of these offenses in open court. Because Mr. Johnson was concerned in the commission of this specific crime, he is what is known in the Law as an "accomplice".

You are instructed as a matter of law that the testimony of an accomplice should be received by the jury with caution; It should be regarded by the jury with suspicion. It ought to be received by the jury with distrust. It should be weighed with great care. It should be subjected to close scrutiny.

[Denied/s/Matthews, Judge]

Phelps V. U. S. 252 F 2d 49

McQuain V. U. S., 198 F 2d 987, 91 U.S. App. D.C. 229

Surratt V. U. S., 269 F 2d 240, 106 U. S. App. D. C. 49

Stephenson V. U. S., 211 F 2d 702

Doherty V. U. S., 230 F 2d 605

Stillman V. U. S., 177 F 2d 607

[Filed Oct. 10, 1962]

DEFENDANTS' INSTRUCTION NO. 16

The witness Clinton Johnson who testified in this case for the government is a paid informer and a drug user. You will recall that he admitted to this on the witness stand. In evaluating the testimony given by this witness against the defendant, Charles Matthews, you are instructed that his credibility, as the credibility of all witnesses, is for you to decide. Credibility, ladies and gentlemen of the jury, is the credence or belief that is to be given to a witness' testimony. In the instance where the witness is a paid informer, you are required under the law to scrutinize his testimony clearly for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness' own interest. The requirement that you do so is more strong where it is additionally shown that the paid informer is also a drug user. In such an instance, you are instructed that you should look to see if there is some corroboration of his testimony. That is, to see if there were other and separate facts or circumstances proven

in this case that tend to directly or indirectly establish that the facts about which he testified did occur. Alternatively, you are instructed that the testimony of a paid informer who is also a drug user should be received by you with suspicion and acted upon with caution.

[Denied/s/Matthews, Judge]

Fletcher vs. U. S., 158 F 2d, 321.

[Filed Oct. 13, 1962]

[CLERK'S CERTIFICATE - VERDICT]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES

vs.

#1 CHARLES MATTHEWS
#2 ELLEN M. PHELPS
#3 ROLAND R. HENRY
#4 NORMAN PANNELL
#5 VALERIA PANNELL
#7 DORIS GARDINER

Criminal No. 289-62

Charge Vio. 18 USC 371; 26 USC
4704a and 4705a; & 21 USC 174.

ON THIS 13th day of October, 1962, came again the parties aforesaid, in manner as aforesaid, and the same Jury as aforesaid returns into Court to resume deliberation; WHEREUPON the said Jury returns into Court and upon their oath say that they find Charles Matthews Not Guilty on Count 1, Guilty on Counts 2, 3 and 4, and Not Guilty on Counts 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of the Indictment; and that they find Ellen M. Phelps Not Guilty on Counts 1, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of the Indictment; and that they find Roland R. Henry Not Guilty on Counts 1, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of the Indictment; and that they find Norman Pennell Not Guilty on Count 1, and Guilty on Counts 8, 9 and 10 of the Indictment; and that they find Valeria Pannell Not Guilty on Count 1, and Guilty on Counts 8, 9, and 10 of the Indictment;

and that they find Doris L. Gardiner Not Guilty on Count 1, and Guilty on Counts 5, 6, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22; AND THEREUPON each and every Juror is asked if that is his or her verdict and each and every Jurors replies that the aforesaid is his or her verdict.

THE DEFENDANTS Charles Matthews, Norman Pannell, Valeria Pannell and Doris L. Gardiner are referred to the Probation Officer of the Court; Doris L. Gardiner is remanded to the District of Columbia Jail; Charles Matthews and Norman Pannell are committed to the District of Columbia Jail; Valeria Pannell is permitted to remain on bond for ten (10) days from this date that she may provide for her children, after which she is to be surrendered to the District of Columbia Jail; Ellen M. Phelps and Roland R. Henry are discharged from their bond to the Court.

By direction of
BURNITA SHELTON MATTHEWS
Presiding Judge
Criminal Court # 5

* * *

* * *

[Filed Dec. 13, 1962]

JUDGMENT AND COMMITMENT
[CHARLES MATTHEWS]

On this 13th day of December, 1962 came the attorney for the government and the defendant appeared in person and by counsel, John Shorter, Esquire; and an information having been filed on November 13, 1962 that Charles Matthews was convicted of violating the Federal Narcotics Laws on June 29, 1955; and the defendant having affirmed in open Court that he is the same Charles Matthews previously convicted;

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violating Title 26 of the United States Code, Sections 4704 (a) and 4705 (a), and Title 21 of the United States Code, Section 174 (Federal Narcotics Laws),

as charged in Counts 2, 3, and 4, and that he is a second offender under Title 26 of the United States Code, Section 7237, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twelve (12) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Burnita Shelton Matthews
United States District Judge.

[Filed Dec. 13, 1962]

NOTICE OF APPEAL
[CHARLES MATTHEWS]

Name and address of appellant - Charles Matthews - D. C. Jail

Name and address of appellant's attorney - John A. Shorter, Jr -
508-5th St., N.W., Wash., 1, D. C.

Offense - 26 USC 4704(a) and 4705(a); 21 USC 174.

Concise statement of judgment or order, giving date, and any sentence

Jury verdict guilty. Sentence imposed December 13, 1962 - 12 years imprisonment.

Name of institution where now confined, if not on bail - D. C. Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

December 13, 1962
Date

/s/ Charles Matthews, Appellant

/s/ John A. Shorter, Appellant's Attorney

[Filed Dec. 13, 1962]

**JUDGMENT AND COMMITMENT
[NORMAN PANNELL]**

On this 13th day of December, 1962, came the attorney for the government and the defendant appeared in person and by counsel, Stanley A. First, Esquire;

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offenses of violating Title 26 of the United States Code, Sections 4704 (a) and 4705 (a), and Title 21 of the United States Code, Section 174 (Federal Narcotics Laws), as charged in Counts 8, 9, and 10, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Burnita Shelton Matthews
United States District Judge.

[Filed Dec. 13, 1962]

**JUDGMENT AND COMMITMENT
[VALERIA PANNELL]**

On this 13th day of December, 1962 came the attorney for the government and the defendant appeared in person and by counsel, Stanley A. First, Esquire;

IT IS ADJUDGED that the defendant has been convicted upon her plea of not guilty and a verdict of guilty of the offenses of violating Title 26 of the United States Code, Sections 4704 (a) and 4705 (a), and Title 21 of the United States Code, Section 174 (Federal Narcotics Laws), as charged in Counts 8, 9, and 10, and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Burnita Shelton Matthews
United States District Judge.

The Court recommends commitment to: Lexington, Kentucky.

[Filed Dec. 13, 1962]

NOTICE OF APPEAL
[NORMAN PANSELL]

Name and address of appellant - Norman Pannell, 701 24th Street
Northeast, Washington, D. C.

Name and address of appellant's attorney

Offense - Violation of Narcotic Laws 26 U.S.C. 4705(a), 4704(a) 21
U.S.C. 174

Concise statement of judgment or order, giving date, and any sentence
October 13, 1962 Jury Verdict of Guilty on above three violations,
Counts 8, 9, 10 of indictment. December 13, 1962 - Five years

Name of institution where now confined, if not on bail - D. C. Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

December 13, 1962
Date

/s/ Norman Pannell
Appellant

* * *

[Filed Dec. 13, 1962]

NOTICE OF APPEAL
[VALERIA PANSELL]

Name and address of appellant - Valeria Pannell, 701 24th Street
Northeast, Washington, D. C.

Name and address of appellant's attorney

Offense - Violation of Narcotic Laws 26 U.S.C. 4705(a), 4704(a) 21
U.S.C. 174

Concise statement of judgment or order, giving date, and any sentence
October 13, 1962 Jury Verdict of Guilty on above three violations,
Counts 8, 9, 10 of indictment.

December 13, 1962 - Five years

Name of institution where now confined, if not on bail - D. C. Jail

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

December 13, 1962
Date

/s/ Valeria Pannell
Appellant

* * *



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,475

CHARLES MATTHEWS,

Appellant,

v.

United States Court of Appeals
for the District of Columbia Circuit

UNITED STATES OF AMERICA,

Appellee.

FILED JUN 13 1963

Nathan J. Paulson
CLERK

FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION FOR REHEARING BY THE COURT EN BANC

The appellant Charles Matthews moves this Court for a rehearing and reconsideration of this appeal by the full bench of the Court. It is asserted that this case was not decided correctly by the three Judge panel that heard the case and rendered a written decision on May 29, 1963, affirming the appellant's conviction. The question that was raised by the appellant in his appeal is one of significant importance in the administration of criminal law in the Federal Judiciary and in the District of Columbia. That is, whether in a criminal case the trial judge



has a duty to advise the jury in clear and firm language that they must and should weigh carefully the testimony against an accused where that evidence consists only of the testimony of an accomplice, who has a bad criminal record, uses drugs, is a paid Government informer, who testifies for the Government because he expects to benefit, and who pleads guilty to the offense about which he testifies upon the advice of an attorney recommended to him by the Prosecutor. The question as here stated correctly describes the factual circumstances involved in the instant appeal. The panel that decided this case ruled that since the trial judge instructed the jury properly about the way it was to receive the uncorroborated testimony of an accomplice that this instruction, in combination with the Court's general charge, was sufficient to discharge the Court's entire duty in the circumstances. This ruling by so much held that since a proper instruction had been given relating to one aspect of the witness's infirmities, that this was sufficient to cover all of them. This can not be. If this is to be the law, then this pronouncement should be made upon the deliberations of the full bench.

In this case the appellant stands convicted of three narcotic law violations arising out of an alleged transfer of a quantity of drugs to a person named Clinton Johnson on December 21, 1961. Only one person testified at the trial that such an event took place. This was Clinton Johnson; his testimony was not corroborated in any respect. Clinton Johnson was charged in the indictment in this case with having sold these same drugs to a Federal agent (the appellant Matthews was charged jointly with Johnson in this sale, as an aider and abetter). Just before the trial began, Clinton Johnson pleaded guilty to the count charging him with possession of the drugs. This plea was made in the presence of and upon the advice of Mr. Johnson's attorney, whom it was later shown was recommended to Mr. Johnson by the prosecutor who tried the case. It was shown at the trial that in addition to being an accomplice, Mr. Johnson had been a drug user, had been convicted twice previously of narcotic

law offenses (involving heroin and marihuana, and on one occasion both), had before his arrest sold marihuana, cocaine and heroin, had been paid money by narcotic agents after he had agreed to cooperate in the prosecution of this case.

The appellant Matthews submitted three written requests to the Court for jury instructions. One asked the Court to tell the jury that "testimony of a paid informer who is also a drug user should be received . . . with suspicion and acted upon with caution" (see Fletcher v. United States, 81 U.S. App. D.C. 306, 158 F.2d 321 (1946)). Another one of the requests dealt with Johnson as an accomplice. The Court in substance granted this instruction. The third request pointed out that Johnson had a poor criminal record and that he testified that he believed he would personally benefit by giving testimony for the Government. The third request further asked that, in view of this, the jury be told "these facts effect the weight that you should give to Johnson's testimony."

As indicated above, and as was noted in the opinion of the Court, the trial Court gave a proper instruction regarding Johnson's role as an accomplice. He was, however, wearing more than this one hat. His role as an informer and the other characteristics about him also required correct analysis by the Court to the jury and appropriate cautionary instructions relating thereto. Proper instructions would have been to the effect that the jury was required to consider these things.

The trial Court did not give the jury stern and explicit cautions that it should receive and weigh the testimony of Johnson carefully and scrutinize it with care, act upon it with extreme caution because he was a paid informer, a drug user, and on account of all the other things about him that dictated a cautious approach to his testimony.

The appellant urges that the failure of the trial Court to give appropriate instructions to the jury regarding every vital aspect of the testimony and evidence against him, deprived him of substantive due process of law. This predicament should be reviewed by the full Court. This is so,

because the opinion of the three panel Court gives approval to the deprivation of the appellant's rights; and it moreover constitutes a watering down of the doctrine espoused by this court in the case of Fletcher v. United States, supra, which has been consistently followed in this Circuit to the time of the decision in this case.

CONCLUSION

It is respectfully submitted that the motion for a rehearing by the Court in banc should be granted.

JOHN A. SHORTER, JR.

Mitchell, Reeves, Ellis & Shorter
508 Fifth Street, N. W.
Washington, D. C.
Attorney for Appellant

CERTIFICATE

I, John A. Shorter, Jr., attorney for the appellant herein, hereby certify that, in my opinion, the grounds set forth in the motion for a rehearing are substantial and the motion is filed in good faith and not for the purpose of delay.

John A. Shorter, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Rehearing by the Court In Banc has been served this 13th day of June, 1963, upon David C. Acheson, United States Attorney, United States Court House, Washington, D. C., attorney for appellee.

John A. Shorter, Jr.